Office - Supreme Court, U. S.
FILED
DEC 10 1953
HAROLD B. WILLEY, Clerk

10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 494

HOLLIS WILLIAMS,

Petitioner,

vs.

BURNEY J. LINDSEY, ADMINISTRATOR OF THE ESTATE OF VERNA HELEN LINDSEY, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, AND BRIEF IN SUPPORT OF PETITION.

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
NORMAN A. MILLER,
135 South La Salle Street,
Chicago 3, Illinois,

FRANK C. MANN,
810 Landers Building,
Springfield, Missouri,
Counsel for Petitioner.

THE BLAKEMORE-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
The Petition for Writ of Certiorari	1
I. Summary Statement of the Matter Involved	1
II. Jurisdictional Statement	3
III. The Question Presented	3
IV. Reasons Relied On for Allowance of the Writ	4
V. Petition for Writ of Certiorari	5
Brief in Support of Petition	7
I. Opinion of the Court Below	7
II. Jurisdiction	7
III. Statement of the Case	8
IV. Specification of Errors	13
V. Summary of Argument	15
The Federal Statute involved (50 U. S. C. Appendix Section 521)	4
A. Section 521 of The Soldiers' and Sailors' Civil Relief Act Must Be Liberally Construed to Effectuate Its Purpose, and All Doubt Will Be Resolved in Favor of the Serviceman	15, 19
B. The Trial Court Erred, and the Supreme Court of Missouri, in Approving the Trial Court's Action, Similarly Erred, in Failing to Grant Petitioner a Postponement of the Trial Because of Petitioner's Absence Due to Military Service in Korea	15, 24

1. The Trial Court's Failure to Grant the Requested Continuance Was a Manifest Abuse of Discretion. The Circumstances Then Before the Trial Court Disclosed That the Ability of Petitioner to Conduct His Defense Was, in Fact, Materially Affected By Reason of His Absence Due to Military Service 16, 24

(a) The action which petitioner was called upon to defend on February 13, 1952 was a different action from the one originally filed by plaintiff, and different from the action pending when Petitioner's depositions were taken .16, 25

(b) Petitioner, although an actual eye-witness to the occurrence, and a necessary and material witness for his defense was deprived of the right to appear in his own defense. Further, three other occupants of the car, eye-witnesses to the event, were unavailable for petitioner's defense because of their own military service; the driver of the car could supply no facts due to a traumatic amnesia. Petitioner was thus forced to trial without the benefit of the testimony of at least four of those who personally saw the event, and was thus unfairly prevented from meeting plaintiff's obviously self-serving testimony 16, 28

(c) Petitioner was entitled to be personally present before the jury so that the jury might evaluate his oral testimony from the witness stand, rather

than from the mere reading of his earlier written depositions 17, 29

(d) Petitioner was entitled to be present in Court to be of assistance to his counsel in conducting his defense ...17, 34

(e) At the time the trial judge denied Petitioner's application for a continuance, he had no evidence of probative value establishing that Petitioner was insured 17, 35

(f) Even if Petitioner had been insured, the very act of the trial judge in forcing the cause to trial in the absence of Petitioner, might have nullified such insurance because of Petitioner's inability to cooperate with defense counsel 17, 38

(g) The jury was patently influenced, to Petitioner's prejudice, by his absence. This is evidenced by the verdict in the full amount of plaintiff's ad damnum, a verdict which even the trial judge felt was grossly excessive, and as to which he granted a substantial remittitur. From the fact that Petitioner's cause was tried in his absence, the jury unquestionably concluded that he was insured; and as a result, arrived at a verdict upon factors wholly outside of the issues being tried 18, 40

2. Even if Petitioner Was Insured (By a Policy of Automobile Liability Insurance), Such Circumstances Was Wholly Immaterial in Determining Whether Petitioner Had Been Granted His Day in Court ...18, 49

(a) Cooperation clauses, found in Standard Automobile Liability policies, requiring acts on the part of the insured, as a condition precedent to any obligation on the part of the insurer, are valid and enforceable in Missouri as well as other states. In the event of failure of the insured to so cooperate, he may forfeit his rights to indemnification 18, 51

Discussion of Boone v. Lightner 48

Conclusion 55

TABLE OF CASES.

Boone v. Lightner, 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. Ed. 1587 .....14, 15, 22, 27, 47, 48, 55, 56
Bowsman v. Peterson, 45 F. S. 741.....15, 17, 20, 30
Continental Ill. National Bank v. University of Notre Dame, 394 Ill. 584, 69 N. E. 2d. 301.....17, 31, 34
Cox v. Wilkes-Barre Ry. Co., 334 Pa. 568, 6 At. 2d....16, 27
Davis v. Wyche, 224 N. C. 746, 32 S. E. 2d 358.....17, 18, 22, 30, 39, 53
Donlon v. American Motorists Ins. Co., 147 S. W. 2d 176 .....18, 51
Esposito v. Schille, 131 Conn. 449, 40 At. 2d 745....16, 46
Gross v. Williams, 149 F. 2d 84 (distinguished)..... 27
In re Adoption of a Minor, 136 F. 2d. 790, 78 U. S. App. D. C. 48 22
Jordan v. Chicago, Burlington & Quincy R. R. Co., 206 Mo. App. 56, 226 S. W. 1023.....16, 27
Kansas Gas & Electric Co. v. Evans, 100 F. 2d 549..16, 27
Kelley v. Kelley, 38 N. Y. S. 2d 344..... 22
Reynolds v. Haulcroft, 205 Ark. 760, 170 S. W. 2d 678.. .....15, 22, 23
Royster v. Lederle, 128 F. 2d 197.....15, 17, 18, 23, 39, 52
Rutherford v. Bentz, 345 Ill. App. 532, 104 N. E. 2d 343 .....17, 32
Semler v. Oertwig, 234 Iowa 233, 12 N. W. 2d 265.... .....15, 17, 23, 31, 43
Simpson v. Swinehart, 98 N. E. 2d 509, 122 Ind. App. 1 .....15, 45
Smith v. Sanders, 293 Ky. 6, 168 S. W. 2d 359.....15, 43
State ex rel Stenstrom v. Wilson, 234 Minn. 570, 48 N. W. 2d 513 .....15, 23
Swiderski v. Moodenbaugh, 44 F. S. 687 27
Ulmer v. Mackey, 242 S. W. 2d 679....15, 17, 18, 39, 45, 53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

HOLLIS WILLIAMS,

Petitioner,

vs.

BURNEY J. LINDSEY, ADMINISTRATOR OF THE ESTATE OF VERNA HELEN LINDSEY, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Earl G. Warren, Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action at law originally brought against Hollis Williams, Petitioner herein, in the Circuit Court for the County of Greene, State of Missouri, by Verna Lindsey, Plaintiff. Verna Lindsey died from causes wholly unrelated

to the accident involved herein, after the judgment was entered in the trial court, and her interest in these proceedings was represented thereafter by Burney J. Lindsey, her Administrator, pursuant to court order substituting such administrator as plaintiff. Although plaintiff's administrator is now the Respondent herein, in the interest of simplicity, we will continue to refer to the original plaintiff as though she were, in fact, the respondent herein. Plaintiff sought to recover damages for personal injuries alleged to have been suffered by her in an automobile accident occurring on May 14, 1950 in Greene County, Missouri while she was a passenger in the rear seat of Petitioner's automobile, being driven at that time by Mary Savage, pursuant to permission of Petitioner. The trial was by jury. A verdict was rendered in favor of plaintiff, assessing plaintiff's damages at $15,000 and on February 14, 1952 judgment was entered in favor of the plaintiff and against Petitioner. Thereafter, the trial court ordered that the plaintiff remit $6,000.00 from the amount of the judgment. Plaintiff, having failed to comply with such *remittitur,* the trial court then sustained Petitioner's motion for new trial *on the sole ground that the verdict was excessive.* On May 22, 1952, the plaintiff died, and as suggested above, the Court substituted her father, Burney J. Lindsey, the Administrator of the Estate of Verna Helen Lindsey, Deceased (the Respondent herein) as party-plaintiff in the place and stead of the said Verna Helen Lindsey. An appeal was taken by the Respondent to the Supreme Court of Missouri, appealing from the order and judgment sustaining Petitioner's (defendant's) motion for a new trial. On July 13, 1953, the Supreme Court of Missouri entered a final judgment order setting aside the order of the trial court granting a new trial, and further remanding said cause to the trial court, with directions to reinstate the original verdict and the judgment ($15,000.00) entered

thereon. Petitioner herein duly filed his motion for rehearing and on September 14, 1953, the Supreme Court of Missouri entered its order overruling Petitioner's motion for rehearing.

Upon the appeal to the Supreme Court of Missouri, Petitioner, as Appellee, urged that the order of the trial court granting him a new trial was correct in any event, because the trial judge, violating the purpose and intention of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C., Appendix, Section 521 (hereinafter, for brevity, referred to as the "Civil Relief Act"), had grossly abused his discretion in failing to grant Petitioner a continuance on the ground that Petitioner, at the time of the trial, was actually in the military service of the United States Government and then stationed in Korea. However, the Supreme Court of Missouri concluded that the verdict was not excessive and rejected the contentions of Petitioner specifically predicated upon the Civil Relief Act, reversed the order granting Petitioner a new trial, and reinstated the $15,000 judgment against him.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 1257(3) of the United States Code, as Amended (U. S. Code, Title 28, § 1257(3)).

III.

THE QUESTION PRESENTED.

The federal question raised by this petition is whether a stay of proceedings against a defendant in military service has been refused under circumstances which denied

rights given by Section 521 of the Soldiers' and Sailors' Civil Relief Act of 1940, said Section being as follows:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act (sections 501-548 and 560-590 of this Appendix), unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. Oct. 17, 1940, c. 888, § 201, 54 Stat. 1181."

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

This case involves a statute of the United States, Section 521 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C., Appendix, Section 521).

The Supreme Court of Missouri has decided a federal question of substance in direct contravention of the applicable decisions of this court and of other federal courts, and in direct contravention of the purpose and intent of the Civil Relief Act.

The decision by the Supreme Court of Missouri now stands as a manifest and significant departure from the intent and purpose of the Civil Relief Act.

The Civil Relief Act was enacted to allow those in the service of the nation to devote their energies to its military matters, free from the urgencies and uncertainties of pending litigation.

Petitioner sincerely believes that if the decision of the

Supreme Court of Missouri is allowed to stand, it may serve to undermine the purpose and intent of the Act and may encourage courts of other jurisdictions, seeking to dispose of the pressing volume of litigation, to disregard or at least give but scant effect to the Act, and thus adversely affect the national interest.

The likelihood of such trend becomes a matter of stark reality in light of the present cessation of actual armed conflict, a condition which tends to lessen public anxiety over the affairs of the men in military service.

Although Petitioner admittedly has a direct personal interest in the relief sought by this petition, Petitioner sincerely hopes, by this petition, to cause the lower courts of the nation to rededicate themselves to the spirit and purpose of this Act, so necessary for the welfare of the man in the armed services.

IV.

PETITION FOR WRIT OF CERTIORARI.

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, commanding that court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete Transcript of the Record of all proceedings in the case entitled on its docket "No. 43236, *Burney J. Lindsey, Administrator of the Estate of Verna Helen Lindsey, Deceased, Appellant* v. *Hollis Williams, Respondent,*" and that said judgment of the Supreme Court of Missouri be reversed and that the cause be remanded with directions that a judgment be entered affirming the order of the Circuit Court of Greene County, Missouri, which properly

granted Petitioner (defendant therein) a new trial, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your Petitioner will ever pray.

HOLLIS WILLIAMS,
Petitioner,

By DONALD N. CLAUSEN,
HERBERT W. HIRSH,
NORMAN A. MILLER,
FRANK C. MANN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

HOLLIS WILLIAMS,

Petitioner,

vs.

BURNEY J. LINDSEY, ADMINISTRATOR OF THE ESTATE OF VERNA HELEN LINDSEY, DECEASED,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri appears at pages 123-136 of the Transcript of Record filed herewith.

II.

JURISDICTION.

The jurisdiction of this Court is invoked in accordance with Section 1257(3) of the United States Code, as Amended (United States Code, Title 28, § 1257(3)).

III.

STATEMENT OF THE CASE.

This was an action filed by the original plaintiff on August 22, 1950 (R. 2) to recover for damages suffered in an automobile accident. The plaintiff claimed she had been injured while riding as a passenger in Petitioner's automobile, which, at the time of the accident, was being driven by another person with the consent of Petitioner. Petitioner was in the automobile and was an eye witness to the circumstances. The original complaint (called a "Petition") charged Petitioner (the defendant) with *specific negligence* in permitting his automobile to be driven by a young woman of immature age and incapable of properly and safely operating the automobile. Plaintiff's complaint was narrowly focused upon this *specific negligence* as undisputably disclosed by allegations of the complaint (R. 3):

> "3. That at said time and place, said automobile was carelessly and negligently operated at a high rate of speed under the circumstances, and by reason of the defendant's carelessness and negligence in entrusting the operation of said automobile to the driver thereof, said automobile was permitted or caused to be driven off of said highway into a ditch and against a tree, severely injuring plaintiff, as hereinafter set out.
>
> "4. That the defendant was in charge of the use, management and operation of said automobile, and unlawfully (fol. 1b), carelessly and negligently entrusted the operation thereof to his agent, when he knew or by the exercise of ordinary care should have known, that she was of immature age, was not licensed to operate a motor vehicle upon the highways of this state, and that she was incompetent and incapable of properly and safely operating said automobile."

Although the original complaint sought recovery in the amount of $40,000.00 (R. 3), plaintiff, on March 31, 1951, reduced her claim to $15,000.00 (R. 6).

Prior to the date when the cause was forced to trial by the trial judge, Petitioner, through his counsel, had filed several motions for continuance, each of such motions being duly supported by affidavit (R. 4, 5, 6, and 7) and made on the ground that Petitioner, because of military service, was unable to be present at the trial, and that such absence would materially affect him in the defense of his cause. *All of such earlier motions for continuance were allowed by the trial court* (R. 6 and 8).

On July 10, 1951, the cause was again continued (R. 11). During the interim, on May 23, 1951 (R. 91-100) and on July 3, 1951 (R. 100-107), depositions were taken of Petitioner at Camp Gordon, Georgia.

After these depositions were taken, the original plaintiff, on September 8, 1951, filed an amended complaint (Called "Amended Petition") (R. 11-13). As we shall demonstrate, *post,* the amended complaint, predicated on a theory entirely different from the original complaint, *amounted, in law, to the filing of a new action.*

Thereafter, the case was set to be tried on February 13, 1952. On February 11, 1952, Petitioner filed another motion for continuance (R. 15, 16), supported by affidavit, claiming that he was still in military service, on active duty in Korea, and could not be present at the trial on February 13, 1952; that while he was in Korea, plaintiff had filed an amended complaint predicated on a different theory from the original complaint; that because of Petitioner's absence, he was materially affected in conducting his defense; that if he were compelled to proceed to trial under such circumstances, he would be deprived of a fair and impartial trial and would be greatly prejudiced thereby. Although plaintiff filed no counter-affidavit and offered no evidence

to contradict the accuracy or effect of Petitioner's written motion for continuance, yet the trial judge overruled Petitioner's motions for continuance (R. 17) and commenced the trial on February 13, 1952 (R. 17).

It would appear that the trial judge, in forcing this cause to trial, improperly considered an unsworn and gratuitous document captioned "Counter-affidavit" filed by plaintiff's counsel almost nine months prior thereto, wholly without leave of court. This document was erroneously captioned "Counter-affidavit" for, in fact, when it was filed on June 8, 1951, *there was no pending motion or affidavit* on behalf of Petitioner seeking a continuance, for, as the cause then stood, it was set for trial on July 10, 1951 (R. 8). This wholly extraneous document purported to advise the court, purely gratuitously, that a policy of automobile liability insurance had been issued to Petitioner with limits of $15,000 indemnification for injury to one person; that plaintiff had theretofore reduced the *ad damnum* of her action to $15,000; and that, thereby, no pecuniary loss could be suffered by Petitioner and he could not be prejudiced by being compelled to go to trial; that the insurance company was the principal party interested in the defense.

This document, labeled "Counter-affidavit" was not sworn to by anyone, but was merely the self-serving statement of Mr. Ransom A. Ellis, Jr., one of the counsel for plaintiff. It was entitled to no consideration by the trial judge.

After denying Petitioner's motion for continuance, on February 13, 1952, the Court called the case for trial and Petitioner's counsel were compelled to try the case even though the Petitioner was then on active military duty in Korea (R. 17). As part of plaintiff's case, plaintiff herself testified as to the facts and as to her injuries (R. 17-41); she also called as witnesses: a member of the

Missouri State Highway Patrol, who came to the scene of the accident about fifteen minutes after it had occurred, and who made an investigation of the discernible facts (R. 42-51); plaintiff's father, who testified concerning the extent of her injuries (R. 51-54); a deputy sheriff of Greene County, who testified concerning his inability to serve certain subpoenas on one of the attending physicians (R. 54-60); plaintiff's aunt who testified concerning plaintiff's physical condition before and after the accident (R. 60-64); Dr. Fitzgerald, who testified concerning plaintiff's injuries (R. 65-80). Plaintiff offered a deposition previously taken of Mary Savage, the person driving Petitioner's car at the time of the accident (R. 80-87).

Due to Petitioner's absence from the country on military service, Petitioner's counsel were limited in presenting his defense to merely offering the depositions taken of Petitioner on May 23, 1951 and July 3, 1951 (R. 92-107). The fact that Petitioner was then in Korea on military duty was established by the testimony of Petitioner's father (R. 89-91).

By way of rebuttal, plaintiff then was successful in persuading the court to receive in evidence a statement given by Petitioner on June 12, 1950, *with the exception of the following paragraph* (R. 108-109):

> " 'I have a policy of insurance with Commercial Casualty Insurance Co. of Newark, New Jersey and Milwaukee Mechanic's Insurance Co. of Milwaukee, Wisconsin, for $15,000 and $30,000 liability, and $50 deductible collision for my car, Policy number MF-1107.' "

Both sides then rested (R. 111) and the Petitioner's motion for directed verdict was denied (R. 111). The case was then submitted to the jury under instructions which, in essence, submitted plaintiff's case on the *res ipsa loquitur* doctrine (R. 112-116). It is undisputed that the case

went to the jury on the *res ipsa loquitur* doctrine. Indeed, the Supreme Court of Missouri recognized such fact and approved the trial court's action in this regard. In its opinion, the Supreme Court of Missouri said (R. 128):

> "We hold that plaintiff made a submissible case under the *res ipsa loquitur* doctrine."

The jury returned a verdict in favor of plaintiff, assessing damages in the sum of $15,000.00, and on February 14, 1952, judgment was entered on such verdict in favor of plaintiff (R. 116).

Thereafter, Petitioner made a motion to set aside the verdict, and to enter judgment for Petitioner, or in the alternative for a new trial (R. 117). In said motion, Petitioner specifically charged, *inter alia*, that the Court erred in requiring Petitioner to go to trial in face of his personal absence in Korea. This charge of error was specifically set forth in such motion (R. 117):

> "(1) Because the Court erred in denying and overruling on February 11, 1952, defendant's Application for Continuance of the trial scheduled for February 13, 1952, and in requiring defendant to go to trial, and in proceeding with the trial of the cause in the absence of the defendant, for the reasons set forth in the Application for Continuance."

Approximately three months later, the trial judge acted upon Petitioner's motion to set aside the judgment and to grant a new trial, and entered the following order (R. 118):

> "Order On Motion—May 13, 1952.
>
> Now on this day comes on for hearing Defendant's motion, heretofore filed herein, praying the Court to set aside the judgment in this cause and grant him a new trial, and upon hearing said motion, it is ordered by the Court that if Plaintiff will on or before May 20, 1952, remit $6,000.00 from the amount of the judgment

> in this cause the motion for new trial will be overruled, otherwise it will be sustained."

The plaintiff refused to accept the *remittitur* and, accordingly, on May 21, 1952, the trial judge entered the following order (R. 119):

> "Now on this day, Plaintiff having failed to comply with the Court order made on the 13th day of May, 1952, by remitting $6,000.00 from the amount of the verdict rendered in this cause, it is ordered by the Court that Defendant's motion for new trial be and is hereby sustained on the grounds that the verdict is excessive."

It was at this stage of the proceedings, namely, on May 22, 1952, that the plaintiff died as the result of an ailment, wholly unrelated to the accident or the injuries she suffered therein, and, on the following day, May 23, 1952, the trial judge entered an order substituting plaintiff's father, her administrator, as party-plaintiff in the place and stead of the said Verna Lindsey (R. 119). Respondent then appealed to the Supreme Court of Missouri from the order granting Petitioner a new trial. As the result of the appeal, the Supreme Court of Missouri set aside the trial court's motion granting Petitioner a new trial and reinstated the $15,000 verdict and judgment previously entered against him.

IV.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Missouri erred in entering its judgment vacating the order of the Circuit Court of Greene County, Missouri, which granted the Petitioner (defendant therein) a new trial, and in reinstating the verdict and judgment entered below against Petitioner in the amount of $15,000, since the effect of such judgment,

(in approving the trial court's denial of Petitioner's motion for continuance) was to deny Petitioner a stay of proceedings in wrongful contravention of Petitioner's rights under the Soldiers' and Sailors' Civil Relief Act of 1940.

In urging such error, we contend that the circumstances of this case do not fall within the facts considered by this court in *Boone* v. *Lightner,* 319 U. S. 561, 87 L. Ed. 1587. The petition presents the unique situation of an absent serviceman's case being forced to trial in what amounted to a wholly new action filed after his depositions were taken in defense to the allegations of the original action.

Petitioner's case here is entirely free from the circumstances which moved this court to find, in the *Boone* case, that the defendant there was unjustly trying to use the Act as a shield to delay the prompt adjudication of his obligations. The defendant there, still located in Continental United States, might well have made arrangements to be present at the trial, had he exhibited reasonable diligence. Petitioner here is not encumbered by any such stigma. At the time of the trial he was many thousands of miles from Greene County, Missouri and on active military duty in his country's service.

The trial court's denial of Petitioner's motion for continuance amounted to a gross abuse of discretion. The final judgment of the Supreme Court of Missouri in approving such denial has effected a serious miscarriage of justice.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

A.

SECTION 521 OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT MUST BE LIBERALLY CONSTRUED TO EFFECTUATE ITS PURPOSE AND ALL DOUBT WILL BE RESOLVED IN FAVOR OF THE SERVICEMAN.

Boone v. *Lightner*, 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. Ed. 1587, 1596.

Bowsman v. *Peterson*, 45 F. S. 741, 743.

Royster v. *Lederle*, 128 Fed. 2d 197, 200.

State ex rel. Stenstrom v. *Wilson*, 234 Minn. 570, 48 N. W. 2d 513, 514, 515.

Semler v. *Oertwig*, 234 Iowa 233, 12 N. W. 2d 265, 270.

Reynolds v. *Haulcroft*, 205 Ark. 760, 170 S. W. 2d 678, 680.

B.

THE TRIAL COURT ERRED, AND THE SUPREME COURT OF MISSOURI, IN APPROVING THE TRIAL COURT'S ACTION, SIMILARLY ERRED, IN FAILING TO GRANT PETITIONER A POSTPONEMENT OF THE TRIAL BECAUSE OF PETITIONER'S ABSENCE DUE TO MILITARY SERVICE IN KOREA.

Smith v. *Sanders*, 293 Ky. 6, 168 S. W. 2d 359.

Semler v. *Oertwig*, 234 Iowa 233, 12 N. W. 2d 265, 270.

Ulmer v. *Mackey*, 242 S. W. 2d 679, 680.

Simpson v. *Swinehart*, 98 N. E. 2d 509, 511, 122 Ind. App. 1.

Esposito v. *Schille*, 131 Conn. 449, 40 Atl. 2d 745, 747, 748.

(These cases discussed in context, *post*, page 43 to 47.)

1.

The Trial Court's Failure to Grant the Requested Continuance Was a Manifest Abuse of Discretion. The Circumstances Then Before the Trial Court Disclosed That the Ability of Petitioner to Conduct His Defense Was, in Fact, Materially Affected By Reason of His Absence Due to Military Service.

See argument.

(a) **The action which petitioner was called upon to defend on February 13, 1952 was a different action from the one originally filed by plaintiff, and different from the action pending when Petitioner's depositions were taken.**

Kansas Gas & Electric Company v. *Evans*, 100 Fed. 2d 549.

Cox v. *Wilkes-Barre Ry. Co.*, 334 Pa. 568, 6 Atl. 2d 538.

Jordan v. *Chicago Burlington & Quincy R. R. Co.*, 206 Mo. App. 56, 226 S. W. 1023.

(b) **Petitioner, although an actual eyewitness to the occurrence, and was a necessary and material witness for his defense was deprived of the right to appear in his own defense. Further, three other occupants of the car, eyewitnesses to the event, were unavailable for Petitioner's defense because of their own military service; the driver of the car could supply no facts due to a traumatic amnesia. Petitioner was thus forced to trial without the benefit of the testimony**

of at least four of those who personally saw the event, and was thus unfairly prevented from meeting plaintiff's obviously self-serving testimony.

See argument.

(c) Petitioner was entitled to be personally present before the jury so that the jury might evaluate his oral testimony from the witness stand, rather than from the mere reading of his earlier written depositions.

Bowsman v. *Peterson*, 45 F. S. 741, 743.
Davis v. *Wyche*, 224 N. C. 746, 32 S. E. 2d 358, 360.
Semler v. *Oertwig*, 234 Iowa 233, 12 N. W. 2d 265, 270.
Continental Illinois National Bank v. *University of Notre Dame*, 394 Ill. 584, 69 N. E. 2d 301, 304.
Rutherford v. *Bentz*, 345 Ill. App. 532, 104 N. E. 2d 343, 346.

(d) Petitioner was entitled to be present in Court to be of assistance to his counsel in conducting his defense.

Continental Illinois National Bank v. *University of Notre Dame*, 394 Ill. 584, 69 N. E. 2d 301, 304.

(e) At the time the trial judge denied Petitioner's application for a continuance, he had no evidence of probative value establishing that Petitioner was insured.

See argument.

(f) Even if Petitioner had been insured, the very act of the trial judge in forcing the cause to trial in the absence of Petitioner, might have nullified such insurance because of Petitioner's inability to cooperate with defense counsel.

Royster v. *Lederle*, 128 Fed. 2d 197, 200.
Davis v. *Wyche*, 224 N. C. 746, 32 S. E. 2d 358, 360.
Ulmer v. *Mackey*, 242 S. W. 2d 679, 680.

(g) The jury was patently influenced, to Petitioner's prejudice, by his absence. This is evidenced by the verdict in the full amount of plaintiff's ad damnum, a verdict which even the trial judge felt was grosssly excessive, and as to which he granted a substantial remittitur. From the fact that Petitioner's cause was tried in his absence, the jury unquestionably concluded that he was insured; and as a result, arrived at a verdict upon factors wholly outside of the issues being tried.

See argument.

2.

Even if Petitioner Was Insured (By a Policy of Automobile Liability Insurance), Such Circumstance Was Wholly Immaterial in Determining Whether Petitioner Had Been Granted His Day in Court.

Royster v. *Lederle,* 128 Fed. 2d 197, 200.
Davis v. *Wyche,* 224 N. C. 746, 32 S. E. 2d 358, 360.
Ulmer v. *Mackey,* 242 S. W. 2d 679, 680.

(a)

Cooperation clauses, found in Standard Automobile Liability policies, requiring acts on the part of the insured, as a condition precedent to any obligation on the part of the insurer, are valid and enforceable in Missouri as well as other states. In the event of failure of the insured to so cooperate, he may forfeit his rights to indemnification.

Donlon v. *American Motorists Ins. Co.,* 147 S. W. 2nd 176, 179 (and cases therein cited).

A.

SECTION 521 OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT MUST BE LIBERALLY CONSTRUED TO EFFECTUATE ITS PURPOSE AND ALL DOUBT WILL BE RESOLVED IN FAVOR OF THE SERVICEMAN.

Section 521 is set out in full, *ante*, p. 4.

Petitioner most earnestly contends that he was denied his day in court because of the trial court's failure to grant a continuance on account of his absence on military duty in Korea. This is both a serious and profound complaint. This charge has overtones which go far beyond the personal grievance of Petitioner. It suggests a growing laxity in effectuating the intent and purpose of the Civil Relief Act. That such laxity may stem from widespread apathy toward the hardships and privations of the man still in the armed forces by no means lessens its evil effect. It is a regrettable, but nevertheless true observation that with the cessation of actual armed conflict, civilians at home are quick to forget the problems of the man still in the armed services.

Similarly, judges no less human, and equally subject to an invasion of the same sentiment, may relax their vigilance in guarding a serviceman's rights under the Civil Relief Act. Objective examination of the record here patently discloses that Petitioner, in fact, was wrongfully deprived of his day in court. The circumstances at the trial reveal that the trial judge, by a gross abuse of discretion, deprived Petitioner of the rights granted him under the Civil Relief Act.

We will not enlarge upon the obvious purpose of Section 521 of the Soldiers' and Sailors' Civil Relief Act. The Congress of the United States has long been acutely aware of the national interest to be served in affording protection to the nation's citizens engaged in military service in time of war or national crisis. Relief was provided as early as

the Civil war, and followed by the Soldiers' and Sailors' Civil Relief Act of 1918. Our national legislators have realistically recognized that the man defending the nation is beset by enough physical and mental problems so that at least during the time he is actively engaged in service, particularly service on foreign shores, his mind should not be preoccupied by extraneous economic matters. Indeed, as said in *Bowsman* v. *Peterson,* 45 F. S. 741, 743:

> "The soldier or sailor in seasons of war has neither time nor mental aptitude for litigation."

A compelling recognition of the purpose of the Act is found in the same opinion (p. 743):

> "The Soldiers and Sailors Civil Relief Act of 1940 (in like manner with all similar previous acts in our history) was prompted by at least two considerations, first, the maintenance in the armed forces of a reasonable measure of that unbothered serenity and security in respect of personal responsibilities which effectively promotes military efficiency and the national defense; and secondly, the assurance that in the field of individual justice no advantage in judicial proceedings by or against a soldier or sailor will result from his absorption in his country's defense."

Distraction, even though momentary, from assigned military duties at a critical pin-point of time might conceivably affect not only the course of a single action, but indeed the entire national security. Further, if it were not for the protection afforded by the Act, we might reasonably expect a lowering of the general morale of our servicemen.

A decision such as the one challenged here holds the seeds of lowered morale. The knowledge that servicemen's rights are the subject of such loose treatment by courts can produce corrupting results to the mental security of our men in the armed forces. To add to such damage, common experience tells us that such insecurity is contagious.

The worry, flowing from such economic insecurity would, for a certainty, be accompanied by a further damaging inroad on morale resulting from the serviceman's conclusion, just or unjust, that he is personally carrying on a war that no one at home cares about. If, added to such personal worry, we find the soldier resigned to the belief that some litigant at home may grow richer because of his absence from the courtroom, such state of mind at once destroys the diligence and morale so vitally necessary to the successful accomplishment of his work in the national defense.

We have hesitated in expressing Petitioner's grievance in sentiments that suggest "flag-waving" or an appeal to sympathy or patriotism. The circumstances here involved, of themselves and without more, present urgent and compelling reasons for a review of the record to determine whether Petitioner here has been deprived of his day in court. We are confident that a review of the record will disclose that the trial judge abused his discretion in failing to grant Petitioner a continuance on the ground of his absence due to his military service in Korea, and that the Supreme Court of Missouri perpetuated such error in its final order in denying Petitioner a new trial and in reinstating the original judgment against him.

We are fully aware, and readily agree, that the Civil Relief Act is not to be employed as a shield from one's just obligations and responsibilities; nor is such action to be used as a means of defeating or delaying a just cause of action. However, in the case here presented, Petitioner's absence at the time of the trial did materially affect his ability to conduct his defense, and the action of the trial judge, in forcing this cause to trial, in the absence of Petitioner, manifested a whole disregard for Petitioner's rights in the matter, and amounted to a clear abuse of discretion.

The Trial Court's Discretion Was Not Absolute, and Should Have Been Exercised in Accordance With Settled Admonitions.

Some discussion is in order concerning the scope of the discretion of the trial judge in considering an application for stay of proceedings made under the Soldiers' and Sailors' Civil Relief Act. It is settled beyond dispute that under the Act, a stay of proceedings is mandatory if the trial judge is of the opinion that the ability of a defendant to conduct his defense is materially affected by reason of absence due to military service. This is clear from the use of the words, "shall * * * be stayed," rather than the phrase, "may be stayed." (*In re The Adoption of a Minor*, 136 F. 2d 790, 78 U. S. App. D. C. 48; also *Davis* v. *Wyche*, 224 N. C. 746, 32 S. E. 2d 358; *Kelley* v. *Kelley*, 38 N. Y. S. 2d 344; *Reynolds* v. *Haulcroft*, 205 Ark. 760, 170 S. W. 2d 678.)

A consideration of the propriety of denying an application for a stay cannot be divorced from the expressions of national policy with respect to the manner in which the Civil Relief Act is to be interpreted and applied. We will not belabor this brief with elaborate citation on this point. It has been amply established by the cases that the Act is to be liberally construed in favor of the serviceman. Indeed, this Court expressed such view in *Boone* v. *Lightner*, 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. Ed. 1587, where the Court said at page 1596:

> "The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service.

> *Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial.* * * *." (Emphasis supplied.)

The same view was expressed in *Royster* v. *Lederle*, 128 F. 2d 197, where it was said at page 200:

> "The statute in question must be liberally construed to effectuate its purpose."

While obviously not controlling, the view expressed in *State ex rel. Stenstrom* v. *Wilson*, 234 Minn. 570, 48 N. W. 2d 513, supports the philosophy of the principle involved where it is said at pages 514 and 515:

> "While the act does not arbitrarily stay all trials, it should be liberally construed so as to protect the civil rights of those serving in our armed forces during the tenure of their service. The court is vested with discretionary power to determine whether the ability of Eugene Stenstrom to conduct his defense will be materially affected by his absence. This discretion, however, is one that should be exercised cautiously, with the object in mind of giving effect to the obvious purpose of the act, which is to protect the civil rights of a person who, on account of his service in the armed forces, cannot be present at a trial or proceeding."

In *Semler* v. *Oertwig*, 234 Iowa 233, 12 N. W. 2d 265, the Court reversed a judgment entered for the plaintiff where the defendant serviceman had moved for a continuance because of his absence on military service, saying at page 270:

> "* * * But doubtful cases should be resolved in favor of the serviceman."

Similarly, in the opinion in *Reynolds* v. *Haulcroft*, 205 Ark. 760, 170 S. W. 2d 678, the Court said at page 680:

> "* * * I would resolve every reasonable doubt in favor of the soldier, sailor or marine, to the end that no substantial right be impinged and no opportunity

to assert a right be denied because of the circumstance of absence."

B.

THE TRIAL COURT ERRED, AND THE SUPREME COURT OF MISSOURI, IN APPROVING THE TRIAL COURT'S ACTION, SIMILARLY ERRED, IN FAILING TO GRANT PETITIONER A POSTPONEMENT OF THE TRIAL BECAUSE OF PETITIONER'S ABSENCE DUE TO MILITARY SERVICE IN KOREA.

1.

The Trial Court's Failure to Grant the Requested Continuance Was a Manifest Abuse of Discretion. The Circumstances Then Before the Trial Court Disclosed That the Ability of Petitioner to Conduct His Defense Was, in Fact, Materially Affected by Reason of His Absence Due to Military Service.

The fact that Petitioner, at the time of the trial, was on active military service in Korea, stands uncontradicted in the record. Plaintiff interposed no evidence or argument to the contrary, or to show that Petitioner, by the exercise of some higher diligence, might have arranged to be present at the trial. Petitioner, through no choice of his own, was many thousands of miles away from Greene County, Missouri, serving the welfare of his fellow citizens, including his adversary, and the trial judge as well. The trial court was not confronted by a question involving nice calculations as to whether Petitioner was hiding behind the Act as a shield, or deliberately trying to postpone the adjudication of his obligations. *Standing monumentally in this entire case is the blunt, stark fact that Petitioner was on foreign shores serving his nation and that, notwithstanding, the trial judge, with no apparent concern for the proper protection of his interests, forced the cause to trial.* The trial judge closed his eyes to all

those danger markers which would normally have alerted a court to safeguard the soldier's interests. We now direct this Honorable Court's attention to the danger signals which the trial court overlooked, and which underlie our contention that the denial of the stay was a gross abuse of discretion.

Many reviewing courts have safeguarded the interests of absent servicemen, and have held that the trial judge abused his discretion in forcing a case to trial during the serviceman's absence. In the interests of a logical presentation of our argument, we have discussed such cases, *post*, following our Point B-1.-(g).

(a) The Action Which Petitioner Was Called Upon to Defend on February 13, 1952, Was a Different Action From the One Originally Filed By Plaintiff, and Different From the Action Pending When Petitioner's Depositions Were Taken.

A unique aspect of this case wholly distinguishes it from those cases where denial of a stay has been found to be a proper exercise of discretion. Here, Petitioner, on the trial, was called upon to meet an entirely different cause of action than that alleged on the original complaint. This one factor alone should have compelled the trial judge to exercise his discretion with the greatest caution, and to resolve all doubts in favor of the absent soldier. In denying the stay, however, the trial judge ignored all cautionary rules. It is difficult to envision a situation which presented more or greater obstacles to an absent defendant's ability to establish his defense. The situation came squarely within the language of the Civil Relief Act. Petitioner's absence materially affected his ability to defend this new cause of action.

When Petitioner's depositions of May 23, and July 3,

1951 were taken, *plaintiff's cause of action announced by her pleadings was premised solely on specific acts of negligence.* Manifestly, Petitioner's counsel were required to direct his defense to meeting only these specific charges of negligence. However, on September 8, 1951, approximately two months *after* the last of such depositions were taken, the plaintiff announced an entirely different theory of her action by filing an amended complaint (called "Petition") (Rec. 11), in which she predicated her action on the *res ipsa loquitur* doctrine only, *abandoning the charges of specific negligence upon which the original complaint had been framed.* This amounted to the filing of an entirely new suit. The amended complaint of September 1951 was not a mere amendment to the original complaint but was a wholly new and superseding complaint. It had as deep and affecting results on Petitioner's rights as though plaintiff filed a suit based upon an entirely new and distinct cause of action. From September 8, 1951 on, Petitioner was required to meet entirely new allegations, and was required to defend an entirely different suit. Yet, this was the suit which the trial court forced to trial on February 13, 1952, in the face of Petitioner's motion for a stay on the ground of absence on military duty.

The depositions taken of Petitioner in May and July of 1951 no longer served to adequately or properly present Petitioner's defense to the new action. Aside from the question whether they adequately and properly presented his defense to the original complaint, by no stretch of the imagination can it be said that Petitioner was given his day in Court, when his counsel were compelled, out of sheer desperation, to avail themselves of these old depositions (directed to the old case). With Petitioner then in Korea, his counsel had no choice but to exercise their best efforts in his behalf in the face of the trial court's arbitrary denial of the motion for continuance. There is no

doubt but that the filing of the amended complaint of September, 1951, predicating the action on the *res ipsa loquitur* doctrine, amounted to the filing of a new and different suit.

Sound legal reasoning dictates that an amended complaint (superseding the original complaint), predicated upon the *res ipsa loquitur* doctrine, amounts to the filing of a new suit, where the original complaint was premised merely upon certain specific acts of negligence. This view is reflected in *Kansas Gas & Electric Co.* v. *Evans,* 100 F. 2d 549 (C. C. A. Fifth), and *Cox* v. *Wilkes-Barre Ry. Corp.,* 334 Pa. 568, 6 Atl. 2d 538.

This is also the view of the Missouri courts as reflected in *Jordan* v. *Chicago, Burlington & Quincy R. R. Co.,* 206 Mo. App. 56, 226 S. W. 1023. In that case, it was held that the filing of an amended complaint against a carrier, based on negligent handling of horses amounted to the filing of a new suit, where the original action was merely predicated on negligent delay.

The case at bar thus presenting the unique aspect of a defendant being forced to trial, during his absence due to military service, in a case which, in fact, amounted to a different lawsuit from the one originally commenced by the plaintiff, is readily distinguishable from the situation presented in *Boone* v. *Lightner, supra,* and from the circumstances confronting the Court in *Gross* v. *Williams,* 149 F. 2d 84, and *Swiderski* v. *Moodenbaugh,* 44 F. S. 687. The latter two cases were the cases upon which the Supreme Court of Missouri justified its ruling that the trial court did not err in denying Petitioner's motion for continuance. The circumstances present in the case at bar, being wholly unique, earnestly suggest a critical examination of the entire record in this case to see whether Petitioner has been denied his day in Court, and whether a gross miscarriage of justice has occurred in the case of a serviceman on active military duty in Korea.

(b) Petitioner, Although an Actual Eyewitness to the Occurrence, and a Necessary and Material Witness for His Defense Was Deprived of the Right to Appear in His Own Defense. Further, Three Other Occupants of the Car, Eyewitnesses to the Event, Were Unavailable for Petitioner's Defense Because of Their Own Military Service; the Driver of the Car Could Supply No Facts Due to a Traumatic Amnesia. Petitioner Was Thus Forced to Trial Without the Benefit of the Testimony of At Least Four of Those Who Personally Saw the Event, and Was Thus Unfairly Prevented From Meeting Plaintiff's Obviously Self-serving Testimony.

We recognize that every case where a serviceman has been denied a continuance does not, *per se*, constitute a violation of the Civil Relief Act. It is conceivable that in some cases the serviceman might not even be a witness. However, in the case at bar, Petitioner, his brother Wilbur Williams, Willard Phillips and Linford Cloyd, four of the seven occupants of the car, were all in military service. Petitioner and his brother Wilbur were in Korea, and Willard Phillips and Linford Cloyd were in military service with their whereabouts at the time of the trial unknown (R. 90-91). Mary Savage, the girl who actually was driving Petitioner's car, had testified by deposition that she had no memory of what had occurred that night or even the day of the accident (R. 80-85). It was apparent from Mary Savage's deposition that she suffered from some sort of traumatic amnesia as a result of the accident, obliterating any recollection of what had happened. The only other occupants of the car and witnesses to the accident were the plaintiff and Rose Savage, the latter not being used as a witness by either party.

These circumstances emphasize and point up the severe

prejudice which resulted to Petitioner from being forced to trial during his absence. It cannot be sincerely contended by anyone that Hollis Williams, Petitioner herein, was not a material and important witness in his own defense. His personal testimony before the jury might well have been the deciding factor toward a verdict in his favor. Yet, in face of the extreme paucity of eyewitness evidence available for Petitioner, because of the absence due to military service, of three of the occupants of the car, and because of the traumatic amnesia of Mary Savage, the driver herself, Petitioner, forced to trial during his absence, was deprived of the right to testify before the jury in his own behalf. The least that the trial court could have done was to postpone the trial until Petitioner might be able to appear in Court, and retell his personal account of the occurrence. This right was denied to Petitioner. It is not stretching a point to say that the Court grossly abused his discretion when he foreclosed Petitioner from personally appearing before the jury.

(c) Petitioner Was Entitled to Be Personally Present Before the Jury So That the Jury Might Evaluate His Oral Testimony From the Witness Stand, Rather Than From the Mere Reading of His Earlier Written Depositions.

The abuse of discretion by the trial court is further manifest from another aspect. Aside from the adequacy and propriety of Petitioner's depositions, Petitioner's defense was further prejudiced by his inability to be present before the jury at the trial. The right of a defendant to be present before the jury is neither an insubstantial right, nor a right of little significance. The factors which juries balance to evaluate the merits of a case are always intangible. The jury is there to see and hear witnesses; to

test the credibility of witnesses, measured by the juryman's personal estimate of the witnesses' integrity. This estimate may be affected one way or another by the witnesses' demeanor on the stand and by their forthrightness. However, these are tests which can be applied only if the witness is personally present on the witness stand. All of this is lost, even though the same testimony might be read into evidence from an earlier deposition.

The right to be personally present before the jury has been carefully regarded by the Courts. Referring again to *Bowsman* v. *Peterson*, 45 F. S. 741, the Court said at page 742:

> "The necessity of the presence of a party at the trial of a civil action for damages against him is admittedly not absolute, but it is at least reasonable. *Within due limitations, he ought to be allowed to testify personally before the jury rather than through the notoriously indifferent medium of deposition.* He should be allowed to scrutinize the jury list, to confront the jury as it is empanelled to observe the responses of its members on the *voir dire* examination, to make suggestions and have them and his preferences and his possible relation to the jurymen considered, in the very important step of peremptory challenges. *He should, if reasonably possible, have the opportunity to be personally before the court and the jury during the entire progress of his trial, manifesting his interest in its event and allowing those charged with the burden of decision to observe him, either for his advantage or to his possible detriment.*" (Emphasis supplied.)

In *Davis* v. *Wyche*, 224 N. C. 746, 32 S. E. 2d 358, in an action similar to the one here at bar, the deposition of the defendant was taken before trial. The trial court sustained the defendant-soldier's motion for continuance, although the plaintiff contended that the defendant would not be prejudiced by a trial in his absence, *since his depo-*

sition had been taken and had been filed. The Supreme Court of North Carolina, in affirming the action of the trial court in staying the trial, said the following at page 360:

> "It is the contention of the plaintiff that the defendant would not be prejudiced by a trial in his absence, since the defendant's deposition has been taken and is on file. While it may be true that parties to actions are sometimes forced to trial in their absence, with only their depositions to be relied upon *we do not concur with the contention that such a situation is not prejudicial to the party so forced. Every party has a right to be present at the trial of his cause, and to be forced to trial without this right on account of absence due to military service can not be said to be without material effect upon such cause,* unless, as by the act provided, the Court shall be of the opinion that such situation does not materially affect his ability to conduct his defense. * * *" (Emphasis supplied.)

The policy announced in the *Bowsman* case was approved by the Supreme Court of Iowa in *Semler* v. *Oertwig,* 234 Iowa 233, 12 N. W. 2d 265, 276. That the right of a defendant to personally appear before the jury is a substantial right was also reflected by the Supreme Court of Illinois in *Continental Illinois Nat. Bank* v. *University of Notre Dame,* 394 Ill. 584, 69 N. E. 2d 301, a case involving the same federal act involved here. There, the Supreme Court of Illinois reversed a judgment entered below where the trial court forced a defendant to trial, and denied a motion for continuance on the ground of military service. *Even though it was contended there by the plaintiff that the defendant was not a competent witness in the case, the defendant's inability to be present at the trial was held to be sufficient ground for reversal of a judgment obtained against him.* At page 304 of the opinion, it was said as follows:

> "Appellees contend that because appellant would

not be a competent witness in his own behalf, under section 2 of the Evidence Act, he was not prejudiced by the denial of his motion for a stay of the proceedings until he could be present. It is not only the right to testify in his own behalf which the Soldiers' and Sailors' Civil Relief Act is designed to protect. It also protects the right of a litigant to be present at the trial, for the purpose of assisting his counsel in the preparation of his case, and its presentation to the court.

"In this case it does not appear that because appellant might be barred by the Evidence Act from testifying on some questions involved in the case, his absence would not prejudice the presentation of his defense and counterclaim. *The trial court had no method of determining what evidence he could and would produce if personally present assisting his counsel.*" (Emphasis supplied.)

The denial of defendant's motion for a stay was there held to be a clear abuse of discretion where the Court said at page 305:

"Under the applicable section of the Soldiers' and Sailors' Civil Relief Act, as well as under paragraph 3 of Rule 14 of this court, the trial court erred in denying the motion of appellant to stay the proceedings. This action was clearly an abuse of the discretion vested in the trial court."

Further persuasive reasoning is found in *Rutherford* v. *Bentz,* 345 Ill. App. 532, 104 N. E. 2d 343, where the Appellate Court of Illinois said at page 346:

"The emphasis on the word 'shall' in the above entitled Act, is by the court to emphasize the mandatory provision of the Act. *This provision was to assure the man or woman in military service, his or her day in court.* In this case, the defendant being in Guam, he could not be present or conduct his defense. While the Act gives the trial court some discretion in granting a continuance where the ability of the de-

fendant to conduct his defense is not materially affected by reason of his military service, in the light of the facts in this case, the action of the trial court in refusing a stay or continuance, operated to deny the defendant Bentz of his day in court, Bentz was entitled to make his defense and by the refusal of the court to continue the case, he was deprived of that right. *Whether Bentz has a good defense to the action is not material. He is entitled to be present in court and present his defense.* We think the trial court erred in refusing to grant a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act, above cited." (Emphasis supplied.)

Both the trial court and the Supreme Court of Missouri took the position that Petitioner's two pre-trial depositions adequately protected Petitioner's interest in the litigation. In so concluding, however, both courts completely ignored the fact that *such depositions were intended to meet only the cause of action as it was then announced in plaintiff's pleadings*—a suit premised upon specific acts of negligence. When plaintiff, by her amended complaint, filed a new action in September, 1951, Petitioner's depositions lost all semblance of adequacy or potency in the proceedings. They were of no more real effect than if they had been directed to the defense of a case in a wholly different field of law. When the trial court and the Supreme Court of Missouri, seek to defend their rulings on the ground that these depositions adequately protect Petitioner's rights in the case, they violate the whole spirit and intent of the Civil Relief Act. The situation confronting the trial court, at best, was one of doubt as to the adequacy of these depositions. As long as there was any doubt, such doubt should have been resolved in favor of Petitioner, the serviceman. (See argument under Point A.)

(d) Petitioner Was Entitled to Be Present in Court to Be of Assistance to His Counsel in Conducting His Defense.

Judicial recognition of a litigant's right to be present in court goes beyond his mere appearance before the jury. An equally significant and essential purpose is served in the litigant being present during the trial to be of assistance to his counsel in the prosecution or defense of his case. The implications of this function are so elementary that we will not elaborate on this point. We are certain that the Justices of this Honorable Court are all acutely aware of the practical problems confronting trial counsel, so as to recognize the importance and indispensability of having the litigant at the side of counsel. The litigant's presence at the counsel table permits counsel to acquaint and orient himself within the factual orbit of the case; it permits counsel to appraise the significance of the adversary's evidence as it is added to the case, hour by hour. It is fair to say that counsel is severely hampered in the adequate preparation of his client's cause if his client is absent. Although we believe that the significance of this point speaks for itself, the point was specifically recognized in *Continental Ill. Nat. Bank* v. *University of Notre Dame,* 394 Ill. 584, 69 N. E. 2d 301. In that case, the Court said at page 304, in speaking of the purpose of the Soldiers' and Sailors' Civil Relief Act:

> "It also protects the right of a litigant to be present at the trial, *for the purpose of assisting his counsel in the preparation of his case, and its presentation to the court.*" (Emphasis supplied.)

(e) At the Time the Trial Judge Denied Petitioner's Application for a Continuance, He Had No Evidence of Probative Value Establishing That Petitioner Was Insured.

Both the proceedings at the trial and the decision of the Supreme Court of Missouri reflect the injection of a wholly extraneous element into this case—namely, the concept that Petitioner was insured. Further, such irrelevant concept was irregularly and improperly injected into the case by a gratuitous document, filed without leave of court, a document which neither the trial court nor the reviewing court might properly consider. Although we contend in Point 2, *post,* that even if Petitioner had been insured, such circumstance was wholly immaterial in determining whether he had been granted his day in court, we desire to point out here that *on February 13, 1952, when this cause was forced to trial, the trial judge had nothing of probative value before him adequately informing him whether Petitioner was named as the insured in an automobile policy, or whether such purported policy of insurance completely indemnified Petitioner against any judgment which he might suffer in the action.*

On June 1, 1951 (R. 8), the trial court granted Petitioner's motion for continuance and set the cause for trial July 10, 1951. *Nothing else was pending at this time relative to setting the cause for trial.* Notwithstanding this state of the record, Ransom A. Ellis, Jr., one of the counsel for the plaintiff, on June 8, 1951 (R. 8), without leave of court, filed a document captioned "Counter-affidavit to defendant's motion for continuance and supporting affidavit." This document, improperly filed as it was, was a nullity. It was not in answer to any motion or affidavit of Petitioner then pending. However, this gratuitous document played a major role in the action of the

trial court denying Petitioner's motion for continuance made on February 11, 1952 (R. 17), and was elaborately referred to in the opinion of the Supreme Court of Missouri (R. 129). *To establish that the concept of insurance was so largely persuasive, we have only but to observe that until this "maverick" document was filed, the trial court consistently had granted Petitioner's previous motions for continuance; merely on the grounds of absence due to military service.* Although the document was of no materiality or relevance, the fact that the affidavit had not been sworn to by Mr. Ellis, nor dignified by his oath, was a further reason which should have moved both the trial court and the reviewing court to wholly disregard the instrument.

When the case was called for trial on February 13, 1952, the trial court had no legally sufficient basis for concluding that Petitioner was adequately indemnified, and had no means of knowing whether or not Petitioner would be materially prejudiced because of his absence. Yet, the trial judge forced the Petitioner to trial. We submit that this action was a gross abuse of discretion on the part of the trial court.

Woven into this pattern of error is one paragraph of a statement given by Petitioner on June 12, 1950, before plaintiff commenced her action. In this statement, purporting to give an account of the accident, was found a paragraph in which Petitioner said that he had a policy of insurance. Plaintiff's counsel sought to have the entire statement, including this paragraph, admitted in evidence as part of the plaintiff's case (R. 108). Petitioner's counsel objected to the introduction of the whole statement as being improper rebuttal (R. 108). Thereafter, plaintiff's counsel was successful in persuading the Court to read the statement to the jury, with the exception of the paragraph relating to insurance. *The paragraph re-*

lating to insurance was never received in evidence. Since this paragraph and the information it purported to convey was never admitted in evidence in this case, neither the trial judge nor the Supreme Court of Missouri should have given any consideration to its purport. Notwithstanding, the Supreme Court of Missouri relied heavily upon this paragraph, *which was never admitted in evidence,* and this paragraph was one of the principal grounds on which the Supreme Court of Missouri concluded that the denial of Petitioner's motion for continuance had not prejudiced him in the presentation of his defense. Indeed, in its opinion, the Supreme Court of Missouri said (R. 129):

> "Defendant says the record does not show that he was insured as alleged by plaintiff; that the unverified statement of plaintiff's counsel filed when no application for continuance was pending proves nothing. But, even so, we do not think the matter material. Defendant does not question the fact that he was so insured. *Furthermore, the fact that he was and is covered by insurance as alleged by plaintiff stands admitted in the unquestioned statement made by defendant* and reaffirmed in his deposition taken and filed in this case long prior to the time the trial court overruled his last application for continuance." (Emphasis supplied.)

It is clear that the Supreme Court of Missouri acted upon a fact which it *assumed* was in evidence. Actually, the purported statement was not in evidence for any purpose, and the reviewing court was clearly in error when it premised the finding, most prejudicial to Petitioner, upon this improperly assumed fact.

The reference in the opinion to Petitioner having "reaffirmed" such statement in his deposition is not correct. References to the record (R. 99 and 107) patently discloses that Petitioner merely said that he signed a statement, but the record does not carry the implications which the reviewing court made in order to support its ruling.

The reviewing court, *only by hindsight*, concluded that the trial judge had not abused his discretion. Had the reviewing court placed itself in the same position of the trial judge, at the moment when trial was commenced, it would have recognized that except for the uncontradicted affidavit of the Petitioner, setting forth his absence due to military service in Korea and other facts showing that his absence woud materially prejudice his defense, *the trial court had no other means of determining whether Petitioner would or would not be prejudiced in his defense.* In light of the express policy of this Court, and the policy expressed by numerous other courts, the failure of the trial judge to accord Petitioner the benefit of the doubt was a gross abuse of discretion, contrary to the express purpose and spirit of the Civil Relief Act.

(f) Even If Petitioner Had Been Insured, the Very Act of the Trial Judge in Forcing the Cause to Trial in the Absence of Petitioner, Might Have Nullified Such Insurance Because of Petitioner's Inability to Cooperate With the Defense Counsel.

Plaintiff's counsel injected the concept of insurance into this cause by the unsworn and self-serving statement contained in the "counter-affidavit" of June 8, 1951 (R. 8). Since the trial court and the reviewing court gave consideration to this purported fact, it is only fair that it be assumed that such policy of insurance contained the standard clauses ordinarily found in such type of policy, including the standard form of "Assistance and Cooperation of the Insured" clause. This type of clause makes it a condition precedent to any liability on the part of the company that the insured appear at the trial and cooperate with defense counsel.

The Supreme Court of Missouri, in its opinion (R. 130),

gave cavalier treatment to the effect of such clause on Petitioner's right, if any, of indemnification. *Clearly, the Supreme Court of Missouri had no right to assume that Petitioner would, nonetheless, be fully indemnified by such policy, even though he failed to appear and defend.* A variety of circumstances may have limited, or indeed excused liability of any insurance company defending Petitioner, such as a special contract with reservation of rights, or a non-waiver agreement, or acts of the insured having the effect of invalidating the insurance coverage.

As we have demonstrated under point 2, *post*, many courts have held that the existence of an insurance policy, alone, affords a defendant no absolute protection, *since his absence from the trial may, indeed, nullify any effective indemnification* (*Royster* v. *Lederle*, 128 F. 2d 197, 200; *Davis* v. *Wyche*, 224 N. C. 746, 32 S. E. 2d 358, 360; *Ulmer* v. *Mackey*, 242 S. W. 2d 679, 680).

The most that might be said in favor of the trial court's action was that there was a *possibility* that Petitioner was insured, and might, therefore, not suffer monetary loss in the event of a judgment against him. However in face of a situation which, at best, manifested only a *possibility*, the trial court should have granted Petitioner's motion for a stay, on the theory that if *any* doubt existed as to whether Petitioner might be materially prejudiced in presenting his defense, such doubt should have been resolved in favor of Petitioner—this in accordance with the well settled national public policy discussed, *ante*, under point A.

(g) The Jury Was Patently Influenced, to Petitioner's Prejudice, by His Absence. This Is Evidenced by the Verdict in the Full Amount of Plaintiff's Ad Damnum, a Verdict Which Even the Trial Judge Felt Was Grossly Excessive, and As to Which He Granted a Substantial Remittitur. From the Fact That Petitioner's Cause Was Tried in His Absence, the Jury Unquestionably Concluded That He Was Insured and As a Result, Arrived At a Verdict Upon Factors Wholly Outside of the Issues Being Tried.

One aspect of the proceedings below demonstrates far more eloquently than any argument which we might make, that Petitioner's absence materially affected the presentation of his defense, to his detriment. The jury returned a verdict assessing plaintiff's damages in the amount of $15,000.00, the precise amount of plaintiff's *ad damnum*, and the amount of the alleged insurance policy. There is no doubt but that this verdict was grossly excessive and could only have been arrived at by a jury by reason of some extraneous and wholly irrelevant aspect of the trial prejudicial to Petitioner.

Although upon this petition for certiorari we cannot raise questions relating to the excessiveness of the verdict, we point to the fact that the trial judge, who heard all the evidence relating to plaintiff's damages, was nevertheless compelled to order that the verdict be remitted from $15,000.00 to $9,000.00. The trial judge recognized that the $15,000.00 verdict, in the face of the evidence, was grossly excessive to the extent of $6,000.00

In printing the record of the proceedings below, we have purposely included all of the medical testimony, as well as the testimony relating to plaintiff's alleged damages so that this Honorable Court, if it so desires, may examine the evidence relating to the nature and extent

of plaintiff's injuries. An examination of the whole record shows that the plaintiff offered no proof of special damages showing how much had been expended on hospital bills, doctor bills and the like, to provide a blueprint for the jury to assess her damages. The jury was invited simply to render any verdict up to $15,000 as they believed would fairly compensate her for her injuries (see Instruction No. 3, Rec. 114). The jury accepted this invitation and, as we contend, had no hesitancy in assessing damages against Petitioner, in the amount of $15,000.00. We respectfully contend that the action of the trial judge in ordering the *remittitur* represented a far more realistic appraisal of plaintiff's injuries, than did the verdict of the jury.

Implicit in the *remittitur* was a recognition that the jury had grossly over-estimated the extent of plaintiff's injuries. Such recognition similarly carried with it the necessary and logical implication that the jury could not have arrived at such a grossly erroneous monetary verdict unless something wholly extraneous and improper had been injected in this case which inflamed their feelings for the plaintiff or against Petitioner. It can never be known what moved the jury to arrive at their grossly excessive verdict. However, it may be fairly reasoned from such circumstances that Petitioner's absence from the trial played some major part in their deliberations. It may well be that the jury, observing that Petitioner did not appear to plead his own cause personally, gratuitously assumed that such absence was due to the fact that Petitioner was fully indemnified by insurance. If such were the case, they would find little difficulty in rendering a verdict against him for $15,000.00, the full amount asked by the plaintiff, relying on the impression that Petitioner would never be called upon personally to pay all or any part of the judgment. Indeed such inference finds support in the

further observation that common experience tells us that a jury would be reluctant to bring in a verdict against an absent serviceman unless they had been informed, directly or indirectly, or improperly assumed, that such absent defendant was fully insured.

We suggest, and firmly contend, that no concept could be as damaging to a defendant's interest in a fair and impartial trial than the knowledge conveyed to the jury, directly or indirectly, or improperly assumed, that the defendant would suffer no personal monetary loss; that any judgment rendered would be paid for by an insurance company. It has been demonstrated that juries are extremely generous in paying out money of insurance companies.

Thus Petitioner's absence from the trial was inextricably tied into the rendition of the excessive verdict by the jury, and the prejudice suffered by Petitioner was just as real, irrespective of whether his defense merely suffered in some way from his personal absence, or whether the jury had gathered the impression that Petitioner was insured. In either event, Petitioner suffered the harmful results which the Soldiers' and Sailors' Civil Relief Act was expressly designed to prevent.

We sincerely contend that the rendition of a verdict which the trial judge felt was so grossly excessive, established without contradiction that Petitioner's absence had materially affected his defense of the cause. The foregoing matters are of vital concern in considering whether the trial judge abused his discretion in forcing the case to trial during Petitioner's absence.

We submit that the granting of the *remittitur* amounted to an admission by the trial judge that he had improperly exercised his discretion in forcing Petitioner's case to trial during his absence on military duty.

Instances Where a Denial of Stay Has Been Held to Constitute Reversible Error.

In connection with our whole argument under this point B ((a) to (g)) we direct this Honorable Court's attention to a number of cases where it was held that the trial court abused its discretion in forcing a serviceman's case to trial during his absence. We recognize that none of these cases control the issues here, but the importance of the issue here presented, both to Petitioner and to other servicemen, justifies a consideration of the legal reasoning supporting such decisions.

In *Smith* v. *Sanders,* 293 Ky. 6, 168 S. W. 2d 359, the Court of Appeals of Kentucky held that a trial court abused its discretion in denying a serviceman's motion for continuance. All that was shown in that case was that the defendant-serviceman was engaged in military duties and could not be present at the trial. Notwithstanding, the reviewing court reversed a judgment entered below for plaintiff on the ground that the trial court abused its discretion in forcing the case to trial.

We refer again to *Semler* v. *Oertwig,* 234 Iowa 233, 12 N. W. 2d 265. There, the Supreme Court of Iowa reversed a judgment entered below for the plaintiff because of the trial court's failure to grant a serviceman's motion for continuance due to his absence in the military service. It is to be noted that plaintiff there (just as plaintiff here) contended that the serviceman's motion should be overruled for the reason that such defendant was insured, and that the insurance company was the real defendant in the case. The Supreme Court of Iowa, however, rejected this contention, and with respect to the manner of construing the Soldiers' and Sailors' Civil Relief Act the court said (12 N. W. 2d 269-270):

"It has uniformly been the holding of all courts

> that such legislation should not be construed narrowly or technically, but broadly and liberally, to effect its purpose to protect both the nation and the interests of those engaged in its defense."

With respect to plaintiff's contention that the motion for continuance should be denied on the theory that the insurance company was the real defendant, the Court said further at page 274:

> "The statute being an Act of Congress, we will be guided by the decisions of the highest federal courts in their interpretations of its various provisions. It is our conclusion that these decisions and the preponderant weight of the decisions of the state courts are against the grounds urged by the appellee, and held by the court, for the denial of the continuance, because of the claimed insurance protection, and do not justify the ruling of the court as against either appellee."

In finding that the trial court abused its discretion, the reviewing court said further at page 275:

> "It is quite generally held that the granting or refusal of a motion for continuance is discretionary with a court, but this presupposes the exercise of a sound judicial discretion, to the end, that, so far as possible, injustice will be done to no party. This is particularly true where a refusal to grant the stay prevents the personal participation of a party in the trial, and, in substance, denies him his day in court. The expressed purpose of this act, and the construction put upon it by both state and federal courts, make it clear that, in refusing a stay, a court should be very certain that its decision, in the individual case, is not defeating the purpose of the act. * * * The supplementary ground of the motion because of remarks of appellee's counsel in the presence of members of the jury panel that the insurance carrier was a real defendant was an additional reason why the motion for continuance should have been granted."

In *Ulmer* v. *Mackey*, 242 S. W. 2d 679, the Court of Civil Appeals of Texas reversed a judgment entered below for plaintiff, finding that the trial judge abused his discretion in denying the serviceman-defendant's motion for continuance. In support of its ruling, the Court said at page 681:

> "Realizing that every party has a right to be present at the trial of his case and that his absence may be prejudicial to such rights, we do not concur in the trial court's action in overruling appellant's motion to stay the trial under the facts in this case."

The simple facts of the case disclosed that the appellant was in the Air Force, stationed in Korea, and it was impossible for him to be present at the trial. It is pertinent to note that the plaintiff resisted the defendant's motion for a continuance on two of the identical grounds which were urged in the case at bar, namely, that his deposition had been taken, and that actually, an insurance company was the real party in interest. Both of these contentions were rejected by the reviewing court.

In *Simpson* v. *Swinehart*, 98 N. E. 2d 509, 122 Ind. App. 1, the Appellate Court of Indiana reversed a judgment entered below for plaintiff in a personal injury action, on the ground that the trial court abused its discretion in denying the serviceman's motion for stay on the grounds of his absence. At the time of the trial, the defendant was in military service in the Philippine Islands. The plaintiff resisted the serviceman's motion for continuance, and (precisely as was done in the case at bar) reduced his *ad damnum* to the exact amount of the automobile liability insurance policy carried by the serviceman. The trial court overruled the motion for continuance and a verdict was rendered in favor of the plaintiff. In setting aside this verdict and judgment, the Appellate Court of Indiana found that the trial court's action was in contravention of the spirit and purpose of the Soldiers' and Sailors' Civil Relief Act and stated at page 511:

"We are always reluctant to say that a trial court has abused the discretion vested in it. *However, when a record discloses facts which indicate there might have been a serious miscarriage of justice because of the trial court's action, it is our duty to do so. We are of the opinion this is such a case.* This action was commenced against appellant after he entered the service of his country and was assigned to a foreign land. The motion showed appellant had no other witnesses to the accident. *He could not reasonably be expected to anticipate in advance the version appellee and his witnesses would give of how the accident occurred. Hence, he was denied the opportunity to rebut appellee's evidence.*" (Emphasis supplied.)

The court's comment has equal application to Petitioner, here.

We particularly call attention to *Esposito* v. *Schille,* 131 Conn. 449, 40 At. 2d 745. There, in a replevin action, a motion of a serviceman-defendant for continuance was denied, and a judgment was rendered for the plaintiff. At the time the motion for continuance was made, the serviceman was overseas. Upon appeal, the claim was made that he had been deprived of the rights given him by the Soldiers' and Sailors' Civil Relief Act. The Supreme Court of Errors of Connecticut reversed the judgment on the sole ground that the serviceman had been deprived of a substantial right under the Act. The motion for continuance disclosed that the defendant, at the time of trial, was in England on the eve of invasion. The Court's comment with respect to this circumstance is worthy of attention, where the Court said at page 747:

"*The compulsion of such an event required him to devote his entire energy to the service of his country; then, more, than at almost any other time imaginable, the Civil Relief Act should protect him and the country for which he fought.* There appears no sound reason for the court's action in the reasons advanced by it or

> in any of the circumstances contained in the record. * * * The circumstances of the present case did not warrant the court in finding that the absence was not prejudicial. The mere fact that delay had ensued was not enough to make it otherwise." (Emphasis supplied.)

It was held that the trial court abused his discretion in forcing the defendant's case to trial. The reviewing court commented on this point as follows at pages 747 and 748:

> "Very likely the only showing that can be made to the trial court will be the statement, or affidavit based upon information and belief, of the soldier's lawyer or other representative. He may be in a distant land * * * and not able to communicate satisfactorily with those at home. *Before compelling a trial, the court should be reasonably certain that the rights of the absent soldier are not prejudiced by the fact of his absence. The discretion of the trial court is great, but his opinion must be based upon some character of showing made to him.*" (Emphasis supplied.)

The Connecticut court aptly points out that the circumstances there (being almost identical with those present in the case at bar) do not fall within the facts considered by this Honorable Court in the *Boone* case. The circumstances which distinguished this case from the *Boone* case are pointed out where the Connecticut court said further at page 747:

> "In *Boone* v. *Lightner, supra,* the court also considered the nature and circumstances of the case, and the kind of harm which the defendant might suffer by a trial in his absence. *In that case those considerations made it almost necessary to decide that the defendant was using the act as a sword, and not as a shield against wrongdoing.*"

The Boone Case Distinguished.

Petitioner's cause is wholly distinguishable from the circumstances considered by this Court in the *Boone* case. As this Court aptly pointed out in the *Boone* case, the defendant there was himself an attorney, sophisticated in the complexities of the law, who was required to answer charges which not only formed the basis of the litigation, but which, indeed, had a direct impact upon his reputation as a lawyer. Further, in the *Boone* case, the defendant, who sought to use the Soldiers' and Sailors' Civil Relief Act as a shield, while admittedly in military service, was not serving his country at some remote foreign outpost, rendering virtually impossible his attendance at the trial of the case. We do not believe that this Court intended that the views expressed in the *Boone* case should be applied without discrimination so as to sanction the act of every trial court in denying a serviceman a motion for continuance made under the Act. *We sincerely believe that each case, where a serviceman claims that he has been deprived of his day in Court, must be separately considered.* Manifestly, if the serviceman has been denied his day in Court when he was in active military service outside of the Continental United States, and when, indeed, such primary circumstance is fortified by the other considerations present in the instant case a reviewing court should scrutinize the record with minute care to see whether or not the serviceman was materially prejudiced in the presentation of his defense.

Admittedly, the trial court's discretion is not absolute, and is subject to review. If, upon such review, the circumstances disclose that the trial court's denial of the continuance was a gross abuse of discretion, then the serviceman is manifestly entitled to relief. In the cases cited in this section, such relief has been granted. We sincerely urge that Petitioner here is entitled to such relief.

2.

Even If Petitioner Was Insured (By a Policy of Automobile Liability Insurance), Such Circumstance Was Wholly Immaterial in Determining Whether Petitioner Had Been Granted His Day in Court.

In the proceedings before the Supreme Court of Missouri, plaintiff contended that Petitioner had not been materially injured in his defense because, in fact, Petitioner was indemnified by a policy of automobile liability insurance; *ergo,* Petitioner would suffer no pecuniary loss. From a reading of the reviewing court's opinion, there is little doubt but that this contention was persuasive to that court. In effect, plaintiff was contending that an insurance company, and not the Petitioner, was the real defendant and was invoking the Soldiers' and Sailors' Civil Relief Act as a shield to protect itself, at least temporarily, from its obligation. The same contention has been raised in numerous other cases. In some of these cases, the contention was rejected, and in other cases, the concept was accepted.

However, we contend that the question whether a serviceman-defendant is insured is wholly immaterial and irrelevant. First, the fact that the defendant may be the named insured in a policy of automobile liability insurance is, of itself, no guarantee that he will be indemnified. For one of many reasons, such insurance may be wholly ineffective. It may well be that under the particular circumstances of the accident the insurance had no application; or that the insurance company has some valid defense to liability on the policy. Under such circumstances, the serviceman would have no right to indemnification in the event a judgment was rendered against him.

Further, the *undue emphasis placed upon the concept of monetary indemnification, ignores the damage to a de-*

fendant's personal reputation. No person having a position of respect and dignity in his local community enjoys the prospect of being the unsuccessful litigant in a personal injury action which may brand him as an irresponsible and careless driver. *This is a matter of reputation, and personal integrity.* It cannot be denied that the rendition of a verdict and judgment against such person will constitute a serious blemish on his general reputation. A person is as much entitled to his day in Court to avoid irreparable damage to his reputation, as he is to avoid the imposition of monetary damages.

Thus, even if the defendant is fully insured, in no event will such insurance mitigate the damage to the defendant's reputation. We believe that this view is sound and deserving of consideration. Existence of insurance has no place in determining whether a serviceman's defense has been materially prejudiced. Yet, in the case here presented, the existence of such insurance was one of the principal factors which moved both the trial court and the Supreme Court of Missouri to hold that the trial court properly exercised its discretion in overruling Petitioner's motion for continuance.

Other valid grounds suggest themselves as reasons why the insurance question is immaterial. Indeed, the insurance company may be insolvent when it is called upon to pay. Further, as suggested earlier, *the very absence of the insured-defendant from the trial may, of itself, invalidate any such insurance* by reason of the resultant inability of the insured-defendant to comply with, and fulfill the requirement found in all of such indemnity policies that the insured fully cooperate with the insurance company in the defense of any suit against him. Ordinarily the obligation of the insurance company is conditioned upon the requirement that the insured be present at the trial and render the assistance of which he is capable. If he fails to perform this part of the contract, the insurer is discharged.

There is no doubt that in Missouri, as well as most every state, the standard "assistance and cooperation clause" found in automobile liability policies has been upheld and strictly construed. The requirement that the insured comply with all conditions of the insurance contract, on his part to be performed, before the insurer's liability becomes effective, was sustained by the St. Louis Court of Appeals (Missouri) in *Donlon* v. *American Motorists Ins. Co.*, 147 S. W. 2d 176, where the Court said at page 179:

> "Without reviewing them here except by reference cases cited in appellant's brief fully sustain the contention that the garnishment must fail because of the failure of the insured to comply with this condition of the policy contract. Those cases are: *Fischer* v. *Western & Southern Indemnity Co.*, Mo. App., 106 S. W. 2d 490; *Nevil* v. *Wahl*, 228 Mo. App. 49, 65 S. W. 2d 123; *St. Louis Architectural Iron Co.* v. *New Amsterdam Casualty Co.*, 8 Cir., 40 F. 2d 344; *Ross* v. *Mayflower Drug Stores* (St. Paul Mercury & Indemnity Co., garnishee), 338 Pa. 211, 12 A. 2d 569; *Finkle* v. *Western Automobile Insurance Co.*, 224 Mo. App. 285, 26 S. W. 2d 843; *Bauman* v. *Western & Southern Indemnity Co.*, 230 Mo. App. 835, 77 S. W. 2d 496; *Metropolitan Casualty Ins. Co.* v. *Colthurst*, 9 Cir., 36 F. 2d 559; *Malloy* v. *Head*, 90 N. H. 58, 4 A. 2d 875, 123 A. L. R. 941; *Clements* v. *Preferred Accident Ins. Co.*, 8 Cir., 41 F. 2d 470, 76 A. L. R. 17; *New Jersey Fidelity & Plate Glass Ins. Co.* v. *Love*, 4 Cir., 43 F. 2d 82; *Clements* v. *Preferred Accident Ins. Co.*, 8 Cir., 41 F. 2d 470, 76 A. L. R. 17."

The *Donlon* case, where the insured failed to furnish the cooperation, required of him under the policy, is an apt example establishing the point for which we contend above, namely, that the mere existence of a policy of insurance is no guarantee that the insurance is effective, or that the insured will be entitled to indemnification. In the case at bar, both the trial court and the reviewing court erroneously acted on the wholly unjustified assumption that the

mere existence of a policy of insurance was an absolute guarantee that Petitioner would be indemnified and, therefore, not prejudiced because of his absence from the trial.

This point has been placed in proper perspective by a number of courts of high authority. Such courts have realistically and properly concluded that the insurance aspect must be ruled out for the reason that the very absence of the insured (even for the good reason of military service) automatically prevents the insured from complying with the obligations undertaken by him in the insurance contract, *thus rendering the insurance wholly ineffective.* This point was involved in *Royster* v. *Lederle*, 128 F. 2d 197. There, it was *conceded* that the serviceman-defendant was insured to the extent of the *ad damnum*. Notwithstanding, the court rejected plaintiff's contention that the insurance justified the trial court in denying the motion for continuance, the Court holding at page 200:

> "Petitioner urges on us that the defendant's ability to conduct a defense is not materially affected, because she offers to accept in full settlement of any judgment she may obtain in the action, the proceeds of the liability insurance policy in question, and that as the defendant admitted in the criminal proceedings that he did not see petitioner before his car struck her and in addition the criminal court found him guilty of reckless driving, he has no defense to the action and his presence at the trial would be of no material aid to the insurance carrier.
>
> "*The statute in question must be liberally construed to effectuate its purpose. We cannot say, as a matter of law, that Ruggiero's rights would not be affected by proceeding to the trial of the cause in his absence. The policy in question provides that the insured should cooperate with the insurer upon its request and should attend hearings and trials and assist in effecting a settlement if the insurer wished to compromise any claim and the contract of insurance further provides it shall be inoperative unless the insured complies with its terms.*" (Emphasis supplied.)

It is not without significance to observe that in the same case the court declared that *Section 103 of the Soldiers' and Sailors' Civil Relief Act operated as much for the benefit of the insurance company as it did for the insured*, the Court saying further at page 200:

> "Section 103 of the Soldiers' and Sailors' Civil Relief Act, 54 Stat. 1179, 50 U. S. C. A. Appendix § 513, provides that whenever, pursuant to provisions in the Act, the enforcement of any obligation or liability or the prosecution of any suit is stayed, *such stay may in the discretion of the court likewise be granted to guarantors or others subject to the obligation or liability the performance of which is stayed to the person in military service.*" (Emphasis supplied.)

The insurance concept was also rejected in *Davis* v. *Wyche*, 224 N. C. 746, 32 S. E. 2d 358, the Court saying there at page 360:

> "Plaintiff contends that the insurance company is the real defendant in interest and seeks to ignore the defendant Wyche altogether so far as the trial is concerned. *This contention is untenable*, for the reason, among others, that the policy involved in this case provides that 'no action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company." (Emphasis supplied.)

In spite of the existence of insurance in the *Davis* case, the reviewing court held that the trial judge properly concluded that the ability of the defendant to conduct his defense was materially affected by reason of his military service, and that a continuance of the cause was proper.

The insurance question was considered in *Ulmer* v. *Mackey*, 242 S. W. 2d 679 (Court of Civil Appeals of Texas).

The Court reversed a judgment entered below for plaintiff after denial of the serviceman's motion for a continuance and, in rejecting the plaintiff's argument that the existence of insurance was sufficient to show that the defendant would not be materially prejudiced in his defense, said the following at page 680:

> *"Under the facts in this case we are compelled to disagree with appellee's contention. In the first place, the judgment for $3,900 is against appellant personally. His insurance company may or may not be solvent at the time it is called upon to pay a judgment in this cause.* Under the terms of the policy appellant was to assist in effecting settlements, securing, giving and obtaining evidence and to assist in the conduct of the trial. *The failure of appellant to so cooperate and act in behalf of his defense might force him to prosecute his claim against said company."* (Emphasis supplied.)

It is pertinent to observe that some states, such as Wisconsin, have enacted procedural statutes which permit an injured person to sue both the insured and the insurance company in the same action. (See Wisconsin Statutes, 1951, Ch. 260, Sec. 260.11.) Missouri does not have such a statute. Assuming for the moment that Missouri did have a joinder statute such as Wisconsin, where the insurance company could be joined with the insured, then under such circumstances there might be some color to the argument that the absence of the insured-defendant might not operate to his monetary prejudice. (Even this argument is not a sufficient answer to all the questions involved.) If this case were an action where an insurance company, as a matter of court record, stood shoulder to shoulder with the insured, as an actual defendant in the cause, we can see how a court might feel that the insured would suffer no monetary injury due to his absence from the trial. However, the record of the cause before this Honorable Court, does not contain one iota of competent evidence establish-

ing that Petitioner's monetary interests were protected by effective insurance. Both the trial court and the Supreme Court of Missouri were acting entirely without legal sanction or justification in assuming that Petitioner was effectively indemnified. They had no right to thus arbitrarily assume that no prejudice would result to Petitioner by reason of his absence from the trial.

Conclusion.

We most sincerely contend that the record here discloses a flagrant case of abuse of discretion on the part of the trial judge, and that such error was perpetuated by the Supreme Court of Missouri in upholding the trial court's action in denying a continuance. The circumstances here considered disclose that a serviceman, on active duty in the defense of his nation in Korea at the time of the trial, was unjustly deprived of his day in Court. A gross miscarriage of justice has been effected. The very fact that the trial judge was constrained to order a *remittitur* of almost half of the judgment gives mute, but none the less effective, testimony that the jury arrived at their verdict against the serviceman because of some extraneous prejudice which was injected into this trial. This prejudice unquestionably stemmed from Petitioner's necessary absence on military duty. Petitioner, as well as three of the other eyewitnesses to the occurrence, were engaged in military service and outside of Greene County at the time of the trial. It would be difficult to reconstruct a concurrence of circumstances having greater claim to the protection afforded by the Soldiers' and Sailors' Civil Relief Act.

We sincerely believe that no aspect of this case would require this Court to depart from any of the sound principles expressed in the *Boone* case. Indeed, the views taken by this Court in the *Boone* case with respect to the liberal

application of the Soldiers' and Sailors' Civil Relief Act bring the circumstances here presented squarely within the purview of such Act.

As this Court said in the *Boone* case (87 L. Ed. 1596):

> "* * * Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial * * *."

Not only was Petitioner's absence from the trial *prima facie* prejudicial, but the other circumstances established that his absence was, in fact, prejudicial. Plaintiff did not lift a finger to make a showing counteracting such *prima facie* prejudice, much less any showing to counteract the prejudice, in fact, established by all the other attendant circumstances. Even if the prejudice be deemed *prima facie* only, Petitioner was entitled to have all doubt resolved in his favor. Petitioner's application for a stay presented a far more persuasive case. Yet, in the face of the complete absence of any showing to the contrary by the plaintiff, the trial court resolved the doubts against Petitioner, a judicial act making a mockery of the Civil Relief Act.

For the reasons hereinabove set forth, we respectfully submit that this Court should grant to this Petitioner its writ of *certiorari* and that upon a full hearing of this cause upon the return of said writ, the judgment of the Supreme Court of the State of Missouri should be reversed, with directions in effect, granting Petitioner a new trial.

Respectfully submitted,

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
NORMAN A. MILLER,
FRANK C. MANN,
Counsel for Petitioner.

Office - Supreme Court
FILED
JAN 12 195
HAROLD B. WILLEY,

11

No. 494.

In the Supreme Court of the United States

October Term, 1953.

HOLLIS WILLIAMS, *Petitioner,*

vs.

BURNEY J. LINDSEY, Administrator of the Estate of Verna Helen Lindsey, Deceased, *Respondent.*

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

JEAN PAUL BRADSHAW,
Attorney for Respondent.

FLAVIUS B. FREEMAN,
NEALE, NEWMAN, BRADSHAW, FREEMAN & NEALE,
Of Counsel.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO

INDEX.

PAGE

Opinion below 1

Jurisdiction 1

Question presented 2

Statute involved 2

Statement 3

Summary of argument 8

Argument 14

Point I. 14

A. 14

B. 16

C. 17

Point II. 21

A. 21

B. 24

C. 27

Point III. 28

A. 28

B. 29

C. 31

D. 31

Conclusion 34

Citations.

Cases:

Boone v. Lightner, 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. Ed. 1587, 1593 ..... 8, 9, 13, 14

Belding v. St. Louis Public Service Co., 358 Mo. 491, 215 S. W. 2d 506, 510 (9-11) 11, 26

PAGE

Esposito v. Schille, 131 Conn. 449, 40 Atl. 2d 745, 748 (9) 9, 18

Gobelman v. Bolt, Mo. Sup., 80 S. W. 2d 167, 175 (8) 12, 29

Gross v. Williams et al. (Commercial Standard Ins. Co., Intervener), 8 C. C. A. 1945, 149 F. 2d 84, 86 (4-6) 8, 10, 11, 15, 27

Johnson v. Johnson, 59 Cal. App. 2d 375, 139 P. 2d 33, 41 (14, 15) 8, 11, 16

Kansas Gas and Electric Company v. Evans, 5 C. C. A., 100 F. 2d 549, 552 (4, 5) 10, 24

Koons v. Nelson, 113 Colo. 574, 160 P. 2d 367, 372 (8) 8, 15

Lindsey v. Williams, Mo. Sup., 260 S. W. 2d 472 1

Ridley v. Young, 64 Cal. App. 2d 503, 149 P. 2d 76, 82 (8) 10, 23

Semler v. Oertwig et al., 234 Ia. 233, 12 N. W. 2d 265, 270 (4-6) 10, 23

Smith v. Harbison-Walker Refractories Co., 340 Mo. 389, 100 S. W. 2d 909 11

State v. Harbison-Walker Refractories Co., 340 Mo. 389, 100 S. W. 2d 909, 912 (1-3) 24

State ex rel. Swanson v. Heaton, 237 Ia. 564, 22 N. W. 2d 815, 816 (3-4) 10, 23

Swiderski v. Moodenbaugh (D. C. Ore.), 44 F. Supp. 687, 688 (3, 4) 8, 9, 10, 16

Statute:

Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C., Appendix, Section 521) 2, 8

Miscellaneous:

H. R. 181, 65 Cong., 1st Sess. 14

H. R. 6361, 65 Cong., 1st and 2d Sess., p. 97 34

In the Supreme Court of the United States

October Term, 1953.

HOLLIS WILLIAMS, *Petitioner,*

vs.

BURNEY J. LINDSEY, Administrator of the Estate of Verna Helen Lindsey, Deceased, *Respondent.*

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

No. 494.

Opinion Below.

The opinion of the Supreme Court of Missouri is *Lindsey v. Williams,* 260 S. W. 2d 472, and appears set out at pages 123-136 of the transcript of record filed by the petitioner herein.

Jurisdiction.

The petitioner seeks to invoke the jurisdiction of this court in accordance with Section 1257(3) of the United States Code, as amended (United States Code, Title 28,

Sec. 1257(3)), to review the above opinion of the Supreme Court of Missouri.

Question Presented.

The only question presented in the present petition for certiorari is: Did the state trial court and the Supreme Court of Missouri abuse their judicial discretion in denying the defendant serviceman a further stay of the above-entitled civil proceeding?

Statute Involved.

The statute involved is the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C., Appendix, Section 521).

STATEMENT.

This was an action filed by the present respondent as plaintiff below to recover for her personal injuries growing out of an automobile accident on May 13, 1950. The respondent was riding as a passenger in an automobile driven by petitioner's agent. Petitioner, too, was riding in the automobile at the time it left the traveled portion of the road, crossed a ditch, and struck a tree in an adjoining field.

In order to avoid confusion, we have in this brief referred to the present petitioner as the defendant below; and to the present respondent as the plaintiff below.

Plaintiff's original petition was filed in the Circuit Court of Greene County, Missouri, on August 22, 1950, setting out two grounds of negligence: (1) the automobile in question was caused or permitted to leave the traveled portion of the highway and strike the tree, and (2) the vehicle was operated at an excessive rate of speed. The prayer of this original petition was for $40,000.00 (T. 3, 4).

Something over ninety days following the accident the defendant entered the military service (T. 90). The case was originally set down for trial for January 29, 1951 (T. 4). Prior to such trial date the defendant's attorneys filed a motion for continuance under the Soldiers' and Sailors' Civil Relief Act (T. 5). While granting the immediate stay, the trial court limited it to continue "until the May term of court, 1951" (T. 6).

On March 31, 1951, the plaintiff obtained permission of the court to amend her petition by reducing the amount of damages claimed from $40,000.00 to $15,000.00, the amount of insurance coverage of the defendant serviceman (T. 6).

On May 9, 1951, the defendant's attorneys filed a second application for stay which was granted, effective until July 10, 1951 (T. 6, 8).

On July 10, 1951, when the case was again set down for trial, it was continued this time at the request of the plaintiff and at her cost (T. 11). In the meantime, on May 23, 1951 (91-100), and later on July 3, 1951 (100-107), two depositions of the defendant were taken at Camp Gordon, Georgia, by agreement of the parties. These were filed with the Circuit Court of Greene County, Missouri (the trial court), on May 29, 1951, and July 9, 1951, respectively (T. 7, 11).

On June 8, 1951, one of the attorneys for the plaintiff filed in the Circuit Court an instrument which he called "Counter-affidavit" but which, in fact, through an oversight was not sworn to. In our Missouri pleading there was, in fact, no requirement that it be sworn to, and the Soldiers' and Sailors' Civil Relief Act did not require that the information therein contained be presented to the trial court in any particular form. No one contended that the facts therein presented were not true, and, of course, this unverified statement, together with the two above-mentioned depositions of the defendant, were before the trial court at the time he overruled defendant's *third* application for continuance filed on February 11, 1952.

It should be pointed out that in the meantime on September 8, 1951, the plaintiff, with leave of court, filed her amended petition (T. 11), withdrawing the allegation of speed which had appeared in the original petition, but leaving in the amended petition the remaining charge that the defendant had permitted the automobile to leave the traveled portion of the highway and strike a tree outside of the right of way.

It should be recalled that in his second deposition the defendant on July 3, 1951, had admitted that he signed a statement attached to the deposition as "Plaintiff's Exhibit 1 FWC," and that the facts set out in such statement were true. This statement appears at pp. 109-11 in the transcript. In this statement the defendant admitted that the automobile had left the traveled portion of the highway and struck the tree, as claimed by the plaintiff. When asked what caused this to happen, the defendant said, "I couldn't figure out what caused it to do that way" (T. 126), and later he again said, "I don't know what happened, to tell the truth" (T. 127).

At the time the judge overruled the third application for continuance filed on behalf of the defendant, he had these depositions and statements made by the defendant before him and realized fully that the defendant, if present at the trial, could not testify to any facts bearing upon the question of liablity. He realized, too, that the only real issue remaining to be tried was the question of injuries, about which the defendant admittedly knew nothing. Since it was firmly established that the serviceman carried insurance protecting him to the extent of $15,000.00 (the limit to which the prayer of the petitioner had been reduced), and since it was apparent that the defendant's insurer was represented by capable lawyers who had had the plaintiff examined by a competent orthopedic surgeon so that they could present their testimony going to the one remaining question of the extent of the injuries, the trial court overruled this third application for continuance on the part of the defendant.

At the trial there was no conflict between the statement affirmed by the defendant in his deposition and the testimony of the plaintiff given from the stand insofar as liability was concerned. There was no showing that the

defendant would have changed his sworn testimony had he been at the trial. Significantly enough, at the trial there was also no conflict in the testimony as to the nature and extent of plaintiff's injuries. Plaintiff called Dr. Robert H. Fitzgerald, an orthopedic specialist from Kansas City, Missouri, who had treated the plaintiff (T. 56-80). Dr. Fitzgerald explained that plaintiff had sustained a "comminuted compound fracture" of the left ankle, producing a "misalignment" at the ankle joint, resulting in permanent and progressive injuries of a very serious character (T. 69). The record showed that after hearing Dr. Fitzgerald's testimony the attorneys representing defendant and his insurer declined to call their orthopedic surgeon, Dr. Yancey, who had examined the plaintiff at their request.

Therefore, as a practical matter there was no conflict between the depositions and testimony of the parties on either of the questions of (1) liability, or (2) the nature and extent of plaintiff's injuries. The trial judge knew at the time he overruled the third application for continuance that the only real question to be passed on at the trial was the amount of plaintiff's recovery. This was true because he then had before him the pleadings and the depositions and admissions of the defendant.

Instruction No. 3 given by the trial judge told the jury that their verdict must not exceed the $15,000.00 asked for in the petition (T. 114). Therefore, although the injuries were of such a serious character as to warrant a much larger verdict, yet the jury were by the court's instruction limited to the $15,000.00 figure. The verdict was, therefore, in the amount of $15,000.00 (T. 116).

Following the verdict, the trial court entered an order for a $6,000.00 remittitur. The plaintiff declined to make the remittitur, the customary order for new trial followed,

and the case went on appeal to the Supreme Court of Missouri.

During the pendency of these latter proceedings the plaintiff was injured when she fell, and was taken to a hospital, where she died. Whether, as defendant on page 13 of his brief says, "plaintiff died as a result of an ailment, wholly unrelated to the accident or the injuries she suffered therein," is a matter for serious debate but wholly irrelevant at this time. It is enough to point out that the action on appeal was revived in the name of the administrator.

Along with several other alleged errors, the question now presented in the present petition for certiorari, namely, whether the trial court abused its discretion in denying defendant's third application for continuance, was carefully considered by the Supreme Court in its opinion reported at 260 S. W. 2d 472. The state Supreme Court held that the trial court did not abuse the discretion vested in it by the Soldiers' and Sailors' Civil Relief Act of 1940, but, rather, that the trial court correctly put the case to trial.

The question, therefore, before this Court on the present application for certiorari is whether the state trial court *and* the Supreme Court of Missouri abused *their* discretion vested in them by the Act.

SUMMARY OF ARGUMENT.

I.

Section 521 of the Soldiers' and Sailors' Civil Relief Act vests in the trial court a sound discretion in determining whether the ability of the defendant to conduct his defense is materially affected by reason of his military service.

A. The judicial discretion conferred on the trial court by the Act "was the very heart of the policy of the Act," and precludes any thought of "rigid and undiscriminating suspension of civil proceedings."

Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 1181, c 888, 5USCA Appx. Sec. 521, 11 FCA title 50, Appx. 9, Sec. 201.

Boone v. *Lightner,* 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. Ed. 1587.

Gross v. *Williams et al.* (Commercial Standard Ins. Co., Intervener), 8 C. C. A., 1945, 149 F. 2d 84.

Koons v. *Nelson,* 113 Colo. 574, 160 P. 2d 367.

B. This judicial discretion is not limited to the *beginning* of the trial, but may, under the Act, be exercised at any state of the proceeding when it shall appear that the serviceman's ability to defend is materially affected by his military service.

Section 521 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Swiderski v. *Moodenbaugh* (D. C. Ore.) 44 F. Supp. 687.

Johnson v. *Johnson,* 59 Cal. App. 2d 375, 139 P. 2d 33.

C. Although there is in our case ample evidence of a probative character upon which to base the trial court's exercise of judicial discretion, yet it is not necessary that the judicial discretion authorized in the Act be based upon "probative evidence"; it is enough that the trial court forms its opinion upon "some character of showing."

Boone v. *Lightner*, 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. Ed. 1587.
Swiderski v. *Moodenbaugh* (D. C. Ore.), 44 F. Supp. 687.
Esposito v. *Schille*, 131 Conn. 447, 40 Atl. 2d 745.

II.

There was no abuse of discretion by the state trial court and the Supreme Court of Missouri in denying petitioner's third application for continuance on the ground of his absence due to military service.

A. Although the suit was pending in Missouri, yet by agreement of the parties the first deposition of defendant was taken in Georgia on May 23, 1951. Thereafter, by agreement defendant's second deposition was taken in Georgia on July 3, 1951. Speaking of these two depositions, the Supreme Court of Missouri said: "defendant had testified fully to her version of the occurrence • • • It is inconceivable that he would have or could have consistently (and with good effect) given different testimony had he been present at the trial" (T. 130). Therefore, the jury had the full benefit of "his version of the occurrence" and nothing more could have been added to the facts had he testified again personally at the trial, particularly since in his second deposition he admitted the correctness of a previous statement (T. 126) in which he said of the accident: "I don't know what happened to tell the truth."

Gross v. *Williams,* 8 C. C. A., 1945, 149 F. 2d 84.
Semler v. *Oertwig et al.,* 234 Ia. 233, 12 N. W. 2d 265.
State ex rel. Swanson v. *Heaton,* 237 Ia. 564, 22 N. W. 2d 815.
Swiderski v. *Moodenbaugh* (D. C. Ore.), 44 F. Supp. 687.
Ridley v. *Young,* 64 Cal. App. 2d 503, 149 P. 2d 76, 82(8).

B. As her grounds of negligence in the original petition, the plaintiff pleaded (1) excessive speed and (2) entrusting the operation of the automobile to a driver who permitted or caused it to be "driven off of said highway into a ditch and against a tree" (T. 3). In the amended petition filed after the taking of defendant's depositions the allegation of speed was withdrawn, and the allegation of negligence limited to the driving of the automobile off of the traveled portion of the highway and into the tree (T. 12). In short, by taking the question of speed out of the case, *the issues were narrowed by the amended petition, not broadened.* Since an amended petition pleads a *new* cause of action only when the evidence required to prove it was not admissible under the first petition, the amended petition in this case did not change the cause of action since the evidence required to prove the sole issue under the amended petition would, of course, have been admissible under the second ground of the original petition. Particularly is this true when, as here, the case was tried as a *res ipsa loquitur* action, for the doctrine of *res ipsa loquitur* is merely a rule of evidence and not of substantive law, and does not give rise to any new issues of fact.

Kansas City Gas & Electric Co. v. *Evans,* 5 C. C. A. 100 F. 2d 549.

Smith v. *Harbison-Walker Refractories Co.*, 340 Mo. 389, 100 S. W. 2d 909.
Belding v. *St. Louis Public Service Co.*, 358 Mo. 491, 215 S. W. 2d 506, 510(9-11).

C. At the time the trial judge on February 11, 1952, overruled defendant's third application for continuance (T. 17), he had before him defendant's two depositions in which defendant admitted he had permitted the operator of his automobile, while operating it under defendant's immediate supervision, to drive the vehicle off of the traveled portion of the highway and against a tree. Defendant's depositions established that the accident occurred under such traffic, highway, and weather conditions that the trial judge knew the case must, as a matter of law, be submitted to the jury as a *res ipsa loquitur* action. This being true, the trial judge knew that under the law of Missouri there could be no serious doubt about defendant's liability after defendant declined to explain the occurrence and contented himself with saying in his depositions that "I don't know what happened * * *" (T. 126, 127). Therefore, defendant's own depositions established beyond argument that the real question then remaining to be tried was the extent and character of plaintiff's injuries, of which defendant admittedly knew nothing. Under these circumstances the trial court properly overruled defendant's third application for continuance, notwithstanding defendant's absence on military duty.

Gross v. *Williams*, 8 C. C. A., 1945, 149 F. 2d 84.
Johnson v. *Johnson*, 59 Cal. App. 2d 375, 139 P. 2d 33.

III.

Defendant's absence did not affect the outcome of the trial, or prejudice his rights in any way.

A. Not only had defendant himself admitted, prior to the trial, the facts fixing liability, but at the trial defendant's counsel declined to offer any medical testimony. Therefore, there was no real controversy about the serious character of plaintiff's permanent injuries. Particularly is this apparent when one recalls that although prior to the trial defendant's counsel had plaintiff examined by a very capable orthopedic surgeon (Dr. Yancey) living in the city where the case was tried, yet, as the Supreme Court of Missouri pointed out, defendant "did not produce him (Dr. Yancey) as a witness nor make any explanation of his failure to do so. It is to be inferred, therefore, that Dr. Yancey would not have testified that plaintiff's injuries were less serious and disabling than her medical testimony showed them to be" (T. 134). Certainly defendant's absence did not keep his counsel from introducing medical testimony showing the extent and nature of plaintiff's injuries.

Gobelman v. *Bolt* (Mo. Sup.), 80 S. W. 2d 167.

B. The fact that the verdict was for the full amount asked is no coincidence. It was neither affected by insurance nor the absence of the defendant, as counsel for defendant now contend. The reason for the verdict is apparent on the face of the record. Although the *only* medical testimony in the record warranted a verdict far in excess of $15,000.00 yet the plaintiff had previously reduced the amount prayed for from $40,000.00 to $15,00.00 so as not to exceed the amount of the insurance coverage. And while the jury knew nothing of this reduction in amount asked or the reasons therefor, yet the jury was told by the trial judge in his Instruction No. 3 that this verdict must "not exceed(ing) the sum of $15,000.00 * * *" (T. 114). Doubtless the verdict would have been

much larger but for this instruction, for it, and not the absence of the defendant or his insurance (which was not known to the jury), pegged the verdict at $15,000.00.

See argument.

C. The verdict was not excessive. After reviewing the entire record, the Supreme Court said of the remittitur cases cited by defendant: "We find none of them at all convincing that an award of $15,000.00 for injuries as extensive, painful and permanently disabling as shown in this case is excessive" (T. 135). Nor did the erroneous remittitur ordered by the trial court have the remotest connection with the overruling of the defendant's third application for continuance.

See argument.

D. Contrary to the argument set out on pages 50 and following of defendant's present brief, there is no evidence of the presence in the policy of a so-called "assistance and cooperation clause" invalidating defendant's policy for his absence from the trial while on military duty. Even if the policy contained the ordinary "assistance and cooperation clause," the unwilling absence from the trial of the serviceman while in the military service could not invalidate the policy. To hold with defendant's counsel in this respect would negative the provision authorizing the exercise of judicial discretion in granting stays, and would, in effect, permit any insurance company to demand in the name of its insured, and obtain as a matter of right, a continuance *in every case* involving an insured serviceman. This would be directly contrary to what this Court has declared "the very heart of the policy of the Act."

Boone v. *Lightner*, 319 U. S. 561, 63 Sup. Ct. 1223, 87 L. Ed. 1587.

ARGUMENT.

Point I.

The Act does not contemplate a mandatory continuance on the mere showing that the defendant was absent in military service. The Act authorizes stays "unless in the opinion of the court the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service." In this respect the Act of 1940 is a substantial re-enactment of the Act of 1918, and a sharp departure from the stay laws of the Civil War era when a rigid provision for continuance of actions was enforced on the mere showing of the defendant's absence in military service.

It has been demonstrated that this provision of the Act vesting judicial discretion in the trial court is a constructive approach to the serviceman's problems.[1] It affords ample protection where the circumstances warrant, while preventing other parties in interest from hiding behind a professed kindness to the soldier as a means of protecting themselves.

A.

Tracing the legislative history of the Act, this Court said in *Boone* v. *Lightner,* 319 U. S. 561, 63 Sup. Ct. 1223, 87. L. Ed. 1587, 1593:

> "* * * we are unable to ignore or sterilize the clause which plainly vests judicial discretion in the trial court."

[1]The House Report on this bill, No. 181, 65th Cong. 1st Sess., stated, in part, as follows: "The lesson of the stay laws of the Civil War teaches that an arbitrary and rigid protection against suits is as much a mistaken kindness to the soldier as it is unnecessary. A total suspension for the period of the war of all rights against a soldier defeats its own purpose. In time of war credit is of even more importance than in time of peace, and if there were a total prohibition upon enforcing obligations against one in military service, the credit of a soldier and his family would be utterly cut off. No one could be found who would extend them credit."

It is obvious that the Act not only vests the trial court with judicial discretion to determine whether the absence of the serviceman will materially affect his defense, but also permits the trial court a wide discretion as to who shall have the burden of proof in any particular instance. This Court said in *Boone* v. *Lightner, supra,* that this was necessary in order to escape "the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary." In short, the purpose of the Act is to escape the very type of undiscriminating suspension of civil proceedings now urged in the name of the present defendant.

In *Gross* v. *Williams et al.* (Commercial Standard Ins. Co., Intervener), 8 C. C. A., 1945, 149 F. 2d 84, 86 (4-6), we believe the rule is correctly stated in these words:

> "A motion under the act is addressed to the discretion of the trial court. The mere fact of service in the armed forces of the United States does not entitle a party to a stay of proceedings against him as a matter of right. The trial court may and should deny the stay when it is apparent that the party absent in the military service will not be materially prejudiced by the trial of the case."

"The language of the act in question certainly vests in the trial court a wide discretion, and that discretion is presumed to have been wisely exercised in the absence of a showing otherwise." *Koons* v. *Nelson* (Colo.), 160 P. 2d 367, 372(8).

The right of the trial court to exercise its judicial discretion in passing upon a continuance similar to that here involved was so well established by this Court in *Boone* v. *Lightner, supra,* that there is no occasion to repeat the arguments justifying such a holding.

The ultimate question then presented by defendant's present petition comes down to this: Did the state trial

court and the Supreme Court of Missouri abuse the discretion vested in them by the Act?

B.

By way of argument it was suggested in the application for continuance that if the plaintiff should prove some ground of specific negligence not set up in the amended petition (which, of course, she would not have been permitted to do if properly objected to), "The defendant and his attorney would be utterly unprepared to meet the proof of such specific negligence" (T. 15). This argument on which the motion was predicated is without merit, for the Act itself provides that the trial judge may at any stage of the proceedings exercise his judicial discrimination to stay the action if and when it shall appear that the serviceman's ability to defend is materially affected by his military service. Of course, his attorneys, after the trial began, could have requested a stay at any stage of the proceedings, had they felt that their fears were justified in predicting that the amended petition was so drawn as to raise additional charges of negligence not foreseen at the time the trial began.

"The court can under the statute halt the case at any time whenever manifest injury to the soldier appears." *Swiderski* v. *Moodenbaugh* (D. C. Ore.), 44 F. Supp. 687, 688(3, 4); *Johnson* v. *Johnson* (Cal.), 139 P. 2d 33, 41 (14, 15).

The conclusion then is inescapable that nothing new and unforeseen developed *after* the trial of this cause began. If the defendant's ability to conduct his defense was materially affected by reason of his military service, such cause of dissatisfaction must have arisen *prior* to the time the trial began—in other words, be limited to the third application for continuance, which was overruled before the trial started.

C.

The defendant suggests, however, on page 35 of his brief that as far as the insurance was concerned there was, at the time defendant's third application for continuance was denied, "nothing of probative value" then before the trial judge adequately informing him of whether there was insurance coverage on this defendant; and on page 38 of his brief the defendant stresses the same point by saying that "the reviewing court, *only by hindsight,* concluded that the trial judge had not abused his discretion because then he had no means other than the "uncontradicted" affidavit of the petitioner from which to determine whether the defendant would be prejudiced by his absence.

Of course, defendant's brief completely disregards the two depositions of the defendant which were on file and available to the trial judge at the time he overruled the defendant's second application for continuance. True, the trial court granted the first application for continuance on January 20, 1951, *before* defendant's deposition had been taken (T. 6). Thereafter, the first deposition was taken on May 23, 1951, following which a second application for continuance by the defendant was sustained on June 1, 1951 (T. 8). Finally, the second deposition of the defendant was taken on July 3, 1951 (T. 11), following which the court overruled defendant's third application for continuance on February 11, 1952 (T. 17).

In other words, the trial judge had before him both of defendant's depositions at the time he overruled the third application for continuance. The reason for the ruling was explained by the Supreme Court of Missouri in its opinion (T. 130):

> "In the two depositions, taken by agreement, defendant had testified fully as to his version of the oc-

currence. In both he admitted that the car was operated and performed exactly as plaintiff testified and that he had no knowledge as to what caused it to perform as it did. It is true that there was a variance between his *testimony* with that of Mary Savage, but there is little or no substantial variance between the *statement* given by him and her testimony; and it must be borne in mind he reaffirmed the statement *in his last deposition. It is inconceivable that he would have or could have consistently (and with good effect) given different testimony had he been present at the trial.*" (Italics ours.)

Therefore, we respectfully submit that the trial judge *did* have before him ample evidence of probative value in the form of defendant's own depositions upon which to exercise a sound discretion in determining that defendant's absence thereafter could not materially affect his defense of the only real issue remaining in the case.

There is no particular form in which the information upon which he bases the exercise of his discretion must come to the trial judge. Fortunately, in this instance it was substantial, in deposition form properly sworn to by the defendant himself, and certainly of probative value. Significantly, it has been said that it is sufficient if the trial court forms its opinion upon "some character of showing," even of a less formal nature if it convinces him that the defendant's rights will not be prejudiced by his absence from the trial. *Esposito* v. *Schille* (Conn.), 40 Atl. 2d 745, 748(9).

The action of the Supreme Court of Missouri in approving the trial judge's exercise of discretion under the Act, was not a case of "hindsight." The depositions were before the trial judge at the time he ruled on the motion, and our state Supreme Court recognized this fact.

The same thing may be said concerning the argument

about insurance. Counsel appearing here in the name of this insured defendant argue that neither this Court nor the Supreme Court of Missouri nor the trial court has any definite knowledge that the defendant was protected by insurance. Defendant's argument in this respect would carry more weight if it were accompanied by absolute forthrightness.

Both the counsel for plaintiff and counsel for the defendant know that this present action before this Court is being brought by attorneys employed by the insurance company which carried the coverage on the defendant. The defendant is merely a nominal defendant. Counsel will not for a minute deny that they do represent the insurance company, via the defendant, and that the defendant had a policy of insurance protecting him in this particular accident to the extent of $15,000.00.

The trial judge, too, knew this at the time he overruled the third application for continuance. In the second deposition taken on July 3, 1951, a prior statement made by the defendant was identified, and, as pointed out by the Supreme Court in its opinion, "it must be borne in mind he reaffirmed the statement in his last deposition" (T. 130). In this statement attached to the deposition and before the trial judge when he overruled the third application for continuance, the defendant said:

> "I have a policy of insurance with Commercial Casualty Insurance Company of Newark, New Jersey, and Milwaukee Mechanic's Insurance Company of Milwaukee, Wisconsin, for $15,000 and $30,000 liability, and $50 deductible collision for my car, Policy number MF-1107."

While this particular paragraph of the statement in the deposition was never read to the jury, yet the trial judge had it before him at the time he ruled on the application

for continuance. And, of course, defendant's counsel have never denied the correctness of this statement. At any rate, it constituted probative evidence of insurance, one of the many circumstances to be considered by the trial judge in exercising his judicial discretion under the Act. *Swiderski* v. *Moodenbaugh, supra.*

On pp. 35-36 of his brief the defendant's counsel call attention to the unverified statement filed by Ransom A. Ellis, Jr., one of plaintiff's attorneys. True, the verification was inadvertently overlooked. But what difference does that make?

Was there any particular form in which the trial judge must come into possession of information on which he exercised his discretion under the Act? No one denies that the facts set out in the Ellis statement were true. What difference, then, could it make if they had been called to the attention of the court in a mere letter to the clerk? The only question is: Was the trial judge apprised of the true facts?

Speaking of the statement's lack of verification, the Missouri Supreme Court said (T. 129):

> "But, even so, we do not think the matter material. Defendant does not question the fact that he was so insured. Furthermore, the fact that he was and is covered by insurance as alleged by plaintiff stands admitted in the unquestioned statement made by defendant and reaffirmed in his deposition taken and filed in this case long prior to the time the trial court overruled his last application for continuance."

In view of these admitted facts, this insurance company should not be permitted to use the defendant serviceman as a stalking horse in such arguments as that appearing on p. 24 of the soldier's brief: "Petitioner was on foreign shores serving his nation and that, notwithstanding, the

trial judge, with no apparent concern for the proper protection of his interest, forced the cause to trial."

Actually, the trial judge evidenced keen concern for the proper protection of the rights of the serviceman. However, it was apparent to him, as it must be apparent here, that the third continuance sought by the attorneys appearing for the named defendant was not sought to protect the soldier "on foreign shores," but, rather, the insurance company located in Chicago and fully represented by counsel.

It is just this very abuse of the Act that the provisions for judicial discretion aimed to prevent.

Point II.

It must be admitted that the trial judge was vested with discretion to determine whether defendant's absence in military service would materially affect the trial of this cause. Having this authority, the action of the state trial judge cannot be disturbed unless it is shown that he abused that discretion.

The state trial judge had the pleadings before him, he had defendant's two depositions before him. He knew what the issues were, and, knowing this, realized fully that defendant's absence could not in any way materially affect the only real issues left open for trial.

A.

On p. 29 and following of his brief, it is said on behalf of the defendant that he was entitled to be present at the trial in order that the jury might evaluate his oral testimony instead of relying on the earlier depositions.

This argument might carry more weight if the defendant in those prior depositions had not admitted the facts

which fixed liability. For example, the Supreme Court of Missouri in its opinion points out that the "defendant had testified fully to his version of the occurrence * * *. It is inconceivable that he would have or could have consistently (and with good effect) given different testimony had he been present at the trial" (T. 130).

In these depositions the defendant testified, for instance, that it was his car, that it was being driven by his girl friend, that he was sitting in the seat beside her watching her drive, that she was an inexperienced driver, and that suddenly the car left the traveled portion of the road and struck a tree outside the right of way. All this he admitted.

When asked in his deposition what had happened to cause the car to leave the highway, he failed to give any explanation and simply said, "I don't know what happened, to tell the truth" (T. 127).

Counsel for the defendant say that the jury were entitled to hear the defendant testify. Testify to what? All of the facts to which he testified were admitted, namely, the operation of the automobile and its leaving the traveled portion of the road and striking the tree. The only thing which he could have explained which was not conceded was: What caused the car to leave the traveled portion of the road? On this, he said, "I don't know what happened, to tell the truth."

As the Supreme Court of Missouri pointed out, this statement could not have been of assistance to the jury, and surely defendant would not have changed his sworn testimony and, once before the jury, have decided that he had sworn falsely and now would give his explanation of what happened.

Thus, we respectfully submit that the absence of the serviceman could not affect the testimony on liability.

Hence, why let the insurance company use his absence as an excuse to obtain for the company a delay of the trial of this lawsuit?

"Congress did not intend that the rights of civilian litigants should not be considered. Whether such a litigant shall be entitled to proceed with the trial of his cause depends upon the circumstances. The serviceman may by his conduct waive his rights under the Act. The nature of the action, or his relation to it, *or his lack of knowledge of the matters involved,* may render his presence at the trial unnecessary to an adequate protection of his rights." (Italics ours.) *Semler* v. *Oertwig et al.* (Iowa), 12 N. W. 2d 265, 270(4-6).

"* * * his (serviceman) lack of knowledge of the matters involved may render his presence at the trial unnecessary to an adequate protection of his rights with the result that no stay is necessary." *State ex rel. Swanson* v. *Heaton* (Iowa), 22 N. W. 2d 815, 816(3, 4).

Although the defendant was present at the accident in our case, yet he testified he did not know what happened. In *Ridley* v. *Young* (Cal. App.), 149 P. 2d 76, 82(8), the defendant serviceman was not at the scene of the accident, and, therefore, did not know any of the facts affecting liability. That case and our case are similar in that the defendant denied any knowledge of how the accident happened. In the Ridley case the California court said (l. c. 82):

> "We are directed to no material facts favorable to the appellant to which he might have testified if he had been present at the trial. We are unable to perceive that his defense to the action was materially, or at all, affected by his absence from the trial. The court, therefore, did not abuse its discretion in refusing to continue the trial."

The exercise of a sound discretion does not require that a civil action be delayed when it affirmatively shows on the record that the serviceman's absence cannot materially affect his defense.

B.

On p. 26 of his brief the defendant says that the filing of plaintiff's amended petition "amounted to the filing of an entirely new suit." Assuming this to be true, the defendant's brief urges that the defendant should have been given an opportunity to be present and testify further. In fact, on p. 26 of their brief, counsel say that they used these two depositions "out of sheer desperation."

Let us examine the record to see how inaccurate is the statement that the filing of the amended petition "amounted to the filing of an entirely new suit."

The original petition set up two grounds of negligence, namely, (1) excessive speed, and (2) the driving of the car off the highway and into a tree.

How were the pleadings changed by the amendment? In the second petition the plaintiff withdrew the question of excessive speed. The only issue left was the negligence, if any, in the driving of the automobile off of the traveled portion of the highway and into the tree. *Thus, it is readily apparent that the issues were narrowed by the amended petition, not broadened.*

It has been said repeatedly that an amended petition states a new cause of action only when the evidence required to prove the amended complaint was not admissible under the first complaint. *Kansas Gas and Electric Company* v. *Evans,* 5 C. C. A., 100 F. 2d 549, 552(4, 5).

Missouri follows this rule of pleading. The Supreme Court of Missouri in *State* v. *Harbison-Walker Refrac-*

tories Co., Mo. Sup., 100 S. W. 2d 909, 912(1-3), stated it this way:

> "It is necessary that the character of the evidence shall be the same so the general identity of the transaction forming the cause of complaint remains the same. It is not objectionable merely that more or different incidents are alleged. 'As long as the plaintiff adheres to the * * * injury originally declared upon, an alteration of the modes in which the defendant has * * * caused the injury is not an introduction of a new cause of action.'"

It is apparent that the amended petition not only did not state a new cause of action, but it actually limited the ground upon which recovery under the old cause of action could be had.

It is suggested that the amended petition converted the case into a *res ipsa loquitur* action.

Granted, but how does that have any bearing on the points here urged?

Under the original petition the defendant was required to defend on both the charges of excessive speed and permitting the car to leave the traveled portion of the highway; on the amended petition he was required to defend on only the latter assignment. The manner in which the plaintiff went about proving this remaining ground of negligence is beside the point. This particular charge of negligence remained the same in both petitions. The defense against the charge would have been the same whether the case was tried under one petition or the other.

We respectfully submit that defendant's confusion comes from the fact that counsel have failed to acknowledge the true nature of a *res ipsa loquitur* action. The doctrine of *res ipsa loquitur* is merely a rule of evidence, not of substantive law. It does not give rise to any new

issues. It merely creates a presumption of negligence based on a statement of the fact—that is the fact that the automobile left the traveled portion of the road.

We believe the applicable rule in this state has been set out by the Supreme Court of Missouri, *en banc,* in the case of *Belding* v. *St. Louis Public Service Co.,* Mo. Sup., 215 S. W. 2d 506, 510 (9-11), where it is said:

> "It is to be borne in mind that a case in which the plaintiff invokes the doctrine of *res ipsa loquitur* is no less a negligence action than one in which he charges specific negligence. In other words, the doctrine does not dispense with the necessity that the plaintiff who charges negligence must prove it, but relates only to the method by which the defendant's negligence may be shown. *Hendricks* v. *Weaver,* Mo. Sup., 183 S. W. 2d 74. It is not a rule of substantive law, but merely one of evidence, and operates as a substitute for specific proof of negligence."

The defendant testified in his depositions that the car in which plaintiff was riding when injured was driven off of the traveled portion of the road across the ditchline and into a tree located in an adjacent field. This much he admitted. As pointed out above, when asked what caused the car to do this, he said: "I don't know what happened, to tell the truth." He also said in his deposition: "I couldn't figure out what caused it to do that way."

The Supreme Court of Missouri in its opinion reviews his testimony (T. 126): "He then testified (in his deposition): '* * * all I know is that in going down the road the car began to swerve violently and left the road and crossed the ditch and ran into a tree. * * * I couldn't figure out what caused it to do that way.'"

The cause of action remained the same in the amended petition. The evidence admissible under the amended com-

plaint would have been admissible under the original complaint. Therefore, this trial was no different from any other in which the serviceman by deposition affirmatively states the facts from which negligence may be inferred and then says that he cannot give any testimony which will throw any light on why the automobile behaved as it did.

Consequently, the defendant's absence by reason of his military service did not materially affect his liability to defend the question of liability.

C.

Under these circumstances the state trial judge knew that under the law of Missouri there could be no real doubt about defendant's liability. The real issue remaining in the case after defendant's second deposition was the nature and extent of plaintiff's injuries. The defendant knew nothing about this question, and, therefore, his absence on military duty could not materially affect the defense on the question of injuries.

The Supreme Court of Missouri in reviewing this portion of the record cited *Gross* v. *Williams,* 8 C. C. A., 1945, 149 F. 2d 84, explaining that "the facts were comparable to those in the instant case." The Supreme Court of Missouri then cited with approval the following statement from *Gross* v. *Williams, supra:*

> "The court may well have decided, from appellant's admissions, that the real issue at the trial would be the extent and character of the injuries sustained by appellees, a subject upon which the appellant knew nothing."

Certainly that was true in our case.

If, as the defendant says on p. 26 of his present brief, his counsel at the trial were required to rely upon the

depositions "out of sheer desperation," defendant's counsel declined to call the orthopedic surgeon whom they had caused to examine the plaintiff.[1]

If counsel for the defendant would not use their own medical testimony to refute the nature and extent of plaintiff's injuries, how can it be said that the presence of their nominal client, the insured, could have naterially affected the defense on the question of injuries?

Therefore, it is readily apparent that on both the question of liability and the question of injury the absence of the defendant in military service did not affect the trial of the issues in this case.

Point III.

On pp. 29-34 of their present brief counsel for the defendant argue that the absence of the serviceman affected the outcome of the trial.

It might be pointed out that at the trial of the case there was about the same amount of flag-waving about this defendant "on foreign shores serving his nation" as appears in the defendant's present brief before this Court. That sort of argument loses sight of the real issues, and, incidentally, proved no more effective on appeal than it did in the trial of the case.

A.

On p. 42 of the brief filed here for defendant, counsel concede that "common experience tells us that a jury would be reluctant to bring in a verdict against an absent service-

[1]Incidentally, we may be permitted to depart from the record enough to point out that this doctor is the nationally famous orthopedic surgeon who was selected to perform the recent operation on the knee of Mickey Mantle, the Yankee baseball star outfielder. Presumably he was imminently qualified to advise the court on the true nature of plaintiff's injuries in the present case.

man * * *." They argue, however, that the explanation for the verdict must be that the jurors "had been informed directly or indirectly, or improperly assumed, that such absent defendant was fully insured."

If by this statement counsel mean that there was in the trial of this case anything improper, such an insinuation is completely refuted by the record and does not warrant any consideration in our brief.

If, on the other hand, counsel mean by this statement that all verdicts "against an absent serviceman" are the result of some improper and extraneous consideration by the court and jury (as well as the highest judicial tribunal in the state), then *a fortiori* we are back to the theory of the laws of the Civil War era, and there would be no occasion to apply a sound judicial discretion in ruling any application for stays in civil proceedings where servicemen are involved.

As a practical matter, what is to be expected when the testimony shows that the defendant had the plaintiff examined by a competent orthopedist, but declined to call that orthopedist to the stand. As the Supreme Court pointed out in its opinion (T. 134):

> "It is to be inferred, therefore, that Dr. Yancey would not have testified that plaintiff's injuries were less serious and disabling than her medical testimony showed them to be."

There was ample authority for this ruling in Missouri. *Gobelman* v. *Bolt*, Mo. Sup., 80 S. W. 2d 167, 175(8).

B.

On p. 40 and following of defendant's brief, counsel argue that the fact that the verdict was for "the full amount of plaintiff's ad damnum" indicated that peti-

tioner's defense was prejudiced by his absence. This, again, disregards the state of the record.

Recalling that the defendant did not offer any medical testimony whatever, the only medical testimony in the record was that introduced by the plaintiff. This showed that the plaintiff's injuries were of such a character as to warrant a verdict far in excess of the $15,000.00 verdict returned.

In fact, it may be assumed that the verdict would have been much larger had not the plaintiff previously reduced the prayer of her petition from $40,000.00 to $15,000.00. This reduction was made in order not to prejudice the serviceman's rights. In his depositions he had stated that he had coverage up to $15,000.00.

Defendant's counsel infer that this information must have reached the jury improperly, and therefore prejudiced the defendant's rights. This is not true, and the record so shows.

In fact, the information about the limit of the verdict was given the jury in the court's instructions. Thus, Instruction No. 3 told the jury that this verdict can "not exceed(ing) the sum of $15,000.00 • • •" (T. 114).

Viewing the matter in a practical way, what would counsel for defendant's insuror expect when the only testimony in the record showed injuries calling for a verdict far exceeding $15,000.00, and when Instruction No. 3 of the court told the jury that their verdict, however, must not exceed "the sum of $15,000.00."

Was there, under such circumstances, anything mysterious or unusual about the fact the verdict was $15,000.00 —or, as the defendant puts it, "the full amount of plaintiff's ad damnum?"

C.

On pp. 40-42 the defendant calls attention to the remittitur which the trial court erroneously sought to enforce. On p. 41 the defendant expresses the opinion that "the action of the trial judge in ordering the *remittitur* represented a far more realistic appraisal of plaintiff's injuries, than did the verdict of the jury." Again, we repeat that if counsel for defendant's insuror felt this way about the matter, they should have called their doctor, Dr. Yancey, to the stand.

This question of remittitur was thoroughly reviewed by the Supreme Court of Missouri, in the light of similar cases in this state involving similar injuries. Our Supreme Court said (T. 135):

> "We find none of them (other cases) at all convincing that an award of $15,000 for injuries as extensive, painful and permanently disabling as shown in this case is excessive."

We do not think the question of the alleged excessiveness or inadequacy of the verdict has anything to do with the issue in the present petition for certiorari. It is enough to point out that the verdict is in keeping with *all* of the medical testimony in the record and has been the subject of a careful reviewing by the court of last resort in this state.

D.

On p. 49 and following, counsel for defendant's insuror argue on behalf of the defendant that he may have been prejudiced since, in their opinion, "the very absence of the injured defendant from the trial may, of itself, invalidate any such insurance by reason of the resultant in-

ability of the insured defendant to comply with, and fulfill the requirement found in all of such indemnity policies that the insured fully cooperate with the insurance company in the defense of any suit against him" (p. 50 of defendant's brief for the present writ).

If this argument were sound, then any insured defendant could defeat what this Court has declared "the very heart of the policy of the Act." *Boone* v. *Lightner, supra.* This presupposes, first, that the policy contained the type of "assistance and cooperation clause," for which the defendant now contends, but which is nowhere borne out by the record, and, secondly, that the unwilling absence of the soldier from the trial in and of itself establishes a lack of cooperation on his part which would permit the insuror to escape liability under the insurance contract.

Of course, the absence of the serviceman under such conditions does not show a lack of cooperation. On the contrary, he gave his depositions in which he very frankly admitted the manner in which the automobile was permitted to leave the highway, and then equally frankly stated that he didn't know what caused it. Thus, he had done all that the spirit of cooperation could require of him.

As to the medical defense, certainly the failure of the insurer's attorneys to put on their medical testimony cannot be laid to the door of the absent serviceman.

In this point the attorneys for defendant's insurer have disclosed their real purpose. The present application for certiorari is the brainchild of the insurer, whose plan would render inoperative the provisions of the Act calling for the exercise of a sound judicial discretion in determining whether the stay should be granted.

Their reasoning takes this line: (1) The unwilling absence of the serviceman from the trial is a violation of

the "assistance and cooperation clause"; (2) When the trial court exercised its discretion to put the case to trial under such circumstances, it relieved the insurer of any liability under the contract; and (3) having thus inadvertently deprived the serviceman of his insurance (according to defendant's theory), it may then be said in all such cases that by exercising the judicial discretion (however soundly) which the Act calls for the court has indirectly been responsible for prejudicing the rights of the serviceman.

Such specious reasoning as that suggested by the defendant finds no acceptance under the plain provisions of the Act and the holding of this Court in *Boone* v. *Lightner, supra.*

This is the sort of thing which the Act intended to prevent. It was never intended that an insurance company should be permitted to delay the trial of a civil case by arguing, on the one hand, that "the circumstances here considered disclose that a serviceman, on active duty in the defense of his nation in Korea at the time of the trial, was unjustly deprived of his day in court" (p. 55 of defendant's brief), and, at the same time, arguing that if the case is not continued as requested by attorneys for the insurer, the insurance company will take the position that this "serviceman, on active duty in the defense of his nation in Korea at the time of the trial" by failing to be present at the trial has forfeited his protection under the policy for failure to cooperate with his insurance company.[1]

[1]These must have been the type of applications for continuance anticipated by Major John H. Wigmore, one of the drafters of the bill, when he stated at the Senate hearings that "a universal stay against soldiers is wasteful, because hundreds of them are men of affairs and men of assets, *and they have agents back here looking after their affairs.* There is no earthly reason why the court proceedings should stay against them. It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no outside assets, that we do not want to forget. He is the man we are thinking of. These other people can take

Conclusion.

While defendant's brief has included many collateral issues, it is bottomed on the proposition that the state trial court and the state Supreme Court abused the judicial discretion vested in them by the terms of the Act. The best answer to all of this argument, which was presented in the state court, is found in the opinion written by the Supreme Court of Missouri (pp. 123-136).

The state trial court had before it the pleadings and the two depositions of the defendant at the time it ruled on the third application for continuance, and to these it applied the sound principles of judicial discretion reaffirmed by this Court in *Boone* v. *Lightner, supra.*

The record here on file with defendant's application for certiorari sufficiently shows beyond question that the one who is seeking to delay the proceedings under the Act is not the insured defendant serviceman, but, rather, the serviceman's insurer.

There is nothing mysterious about the verdict. Liability followed as the direct result of the admissions made by the defendant in his two depositions. The extent of the verdict followed as the direct result of the uncontradicted medical testimony showing the nature and extent of the plaintiff's injuries.

On neither question—liability or extent of the injuries—could the defendant's absence materially affect the outcome of the trial.

The state trial court sustained two applications for continuance filed on behalf of this serviceman. Only after the defendant's second deposition had been filed with the

---

care of themselves, and the court would say to them, 'No; your affair is a going concern; go ahead with the lawsuit. You have a lawyer, you have an agent * * *." Hearings and Memorandum before Senate Judiciary Committee on S. 2859 and H. R. 6361, 65th Cong., 1st and 2d Sess., p. 97.

trial court and it became apparent that his absence could not in any way materially affect any of the issues to be tried, did the trial court overrule defendant's third application for further stay of the proceedings.

The record amply discloses that all doubt was resolved in the serviceman's favor. Only when the serviceman's depositions established beyond question that he could contribute nothing at the trial bearing upon either the question of liability or the extent of the injuries, did the trial court put the case to trial.

Under such circumstances we respectfully submit that there is no evidence on which to convict the Supreme Court of Missouri and the state trial court of an abuse of discretion under the Act.

Respectfully submitted,

JEAN PAUL BRADSHAW,
Attorney for Respondent.

FLAVIUS B. FREEMAN,
NEALE, NEWMAN, BRADSHAW, FREEMAN & NEALE,
Of Counsel.

12

FILED
JAN 27 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 494

HOLLIS WILLIAMS,
Petitioner,

vs.

BURNEY J. LINDSEY, ADMINISTRATOR OF THE ESTATE OF VERNA HELEN LINDSEY, DECEASED,
Respondent.

REPLY BRIEF OF PETITIONER.

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
NORMAN A. MILLER,
135 South La Salle Street,
Chicago 3, Illinois,

FRANK C. MANN,
810 Landers Building,
Springfield, Missouri,
Counsel for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX TO PETITIONER'S REPLY BRIEF.

Summary of Argument.

PAGE

A. In reviewing the trial court's denial of Petitioner's application for continuance, the matter must be considered only in light of such information as the trial judge had before him at that time, and not in light of information coming to his attention during the trial, itself. When the trial judge denied Petitioner's application for continuance, he did not have actual knowledge of the contents of Petitioner's depositions nor of Petitioner's statement, attached thereto as an exhibit. Therefore he had no basis upon which he could conclude that Petitioner had already given all the testimony necessary for an adequate presentation of his case. In the absence of such actual knowledge, the trial court's ruling was purely arbitrary, and constituted a gross abuse of discretion 2

B. Plaintiff Below, by Filing an Amended Complaint, Broadened the Issues Upon Which the Trial Was Had 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 494.

HOLLIS WILLIAMS,

Petitioner,

vs.

BURNEY J. LINDSEY, ADMINISTRATOR OF THE ESTATE OF VERNA HELEN LINDSEY, DECEASED,

Respondent.

REPLY BRIEF OF PETITIONER.

To the Honorable Earl G. Warren, Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

Petitioner, defendant below, is compelled to bring to the attention of this Honorable Court several statements and contentions contained in Respondent's brief which expressly or by implication distort Petitioner's position before this Court.

In reviewing the trial court's denial of Petitioner's application for continuance, the matter must be considered only in light of such information as the trial judge had before him at that time, and not in light of information coming to his attention during the trial, itself. When the trial judge denied Petitioner's application for continuance, he did not have actual knowledge of the contents of Petitioner's depositions nor of Petitioner's statement, attached thereto as an exhibit. Therefore he had no basis upon which he could conclude that Petitioner had already given all the testimony necessary for an adequate presentation of his case. In the absence of such actual knowledge, the trial court's ruling was purely arbitrary, and constituted a gross abuse of discretion.

The gravamen of Respondent's brief is that the trial court was not guilty of an abuse of discretion in denying Petitioner's third application for a continuance *because the trial court had actual knowledge of the contents of the two depositions which had been previously taken of Petitioner.* From this misleading statement by Respondent, this Court would naturally gather the impression that the trial court actually read and considered these two depositions. Contrary to Respondent's statement to this effect, the fact is that *the two depositions taken of Petitioner,* respectively on May 23, 1951 (R. 91, *et seq.*) and July 3, 1951 (R. 100, *et seq.*), *were not actually considered and read by the trial judge when he ruled upon defendant's third application for continuance* on February 11, 1952 (R. 17 *et seq.*). These depositions admittedly had been filed with the Clerk of the trial court, but had not been opened, read or considered by the trial judge when he ruled adversely to Petitioner and forced Petitioner's case to trial. Respondent's trial counsel urged upon the trial court the bare fact that defendant's deposition had twice been taken, but Petitioner's

trial counsel recall that no reference was made either to the content or substance of Petitioner's testimony, nor to the contents of Petitioner's written statement which was attached to the deposition as an exhibit. Notwithstanding, Respondent now attempts to persuade this Court that the trial judge was completely informed as to the contents of the two written depositions and the statement, and as a consequence, evaluated the nature and effect of such written testimony. This wholly misleading impression is created in Respondent's brief, at the places hereinafter indicated. We present our comment in the parenthetical paragraphs following each instance.

(a) Resp. Brief, Page 5, where it is stated:

"At the time the judge overruled the third application for continuance filed on behalf of the defendant, he had these depositions and statements made by the defendant before him and realized fully that the defendant, if present at the trial, could not testify to any facts bearing upon the question of liability. He realized too, that the only real issue remaining to be tried was the question of injuries, about which the defendant admittedly knew nothing."

(The trial judge did not consider the contents of the depositions, and had no basis for knowing what the defendant would or could testify to if he were present at the trial).

(b) Resp. Brief Page 17, where it is stated:

"Of course, defendant's brief completely disregards the two depositions of the defendant which were on file and available to the trial judge at the time he overruled the defendant's second application for continuance."

(Respondent, by the use of the words "on file" and "available," attempts to imply that the trial judge *availed* himself of the contents of the depositions in

his deliberation on Petitioner's third application for continuance. This implication has no foundation in fact.)

(c) Resp. Brief Page 17, where it is stated:

"In other words, the trial judge had before him both of defendant's depositions at the time he overruled the third application for continuance."

(Again, this affirmative statement and its implications have no foundation in fact.)

(d) Resp. Brief Page 18, where it is stated:

"Therefore, we respectfully submit that the trial judge *did* have before him ample evidence of probative value in the form of defendant's own depositions upon which to exercise a sound discretion in determining that defendant's absence thereafter could not materially affect his defense of the only real issue remaining in the case."

(This is another example of the distortion of the true circumstances surrounding the third application for continuance. The fact that the depositions were unopened and not actually considered by the trial judge, although merely on file in the clerk's office, certainly deprives Respondent of the argument that the trial judge actually knew what the effect of Petitioner's written depositions would have upon the adequate presentation of his case. Respondent's argument in this connection has no foundation in fact and is grossly misleading.)

(e) Resp. Brief Page 18, where it is stated:

"The depositions were before the trial judge at the time he ruled on the motion, and the State Supreme Court recognized this fact."

(We are compelled to point out that Respondent's repetition of this misleading fact has colored his en-

tire argument, and created an atmosphere wholly contrary to the actual circumstances surrounding the ruling of which Petitioner here complains. The fact that the Supreme Court of Missouri, too, was persuaded by a similar argument by Respondent, premised upon the concept that the trial court actually read and considered the depositions, has no relevancy herein, since that reviewing court also was acting upon an erroneous assumption.)

(f) Resp. Brief Page 21, where it is stated:

"The State trial judge had the pleadings before him, he had defendant's two depositions before him. He knew what the issues were, and, knowing this, realized fully that defendant's absence could not in any way materially affect the only real issues left open for trial."

(While one mistake on the part of Respondent in asserting a misleading fact might be excused on the grounds of inadvertance or misunderstanding, Respondent's persistent repetition of the misleading fact shows that such assertion was not the product of mere inadvertence, but rather an integral part of a strategy calculated to make the non-existent fact take on the semblance of reality by the device of mere constant repetition.)

Respondent persists in telling this Court unequivocally that the trial judge had *actual knowledge* of what was contained in Petitioner's two written depositions, and *actually weighed* and measured the effect of this written testimony in light of the pleadings and issues. This was not true. *The first time the trial judge knew what was in the written depositions was when they were actually introduced in evidence in the course of the trial.* We submit that we are correct in the statement in our first brief that the Supreme Court of Mis-

souri, only by hindsight, exonerated the trial judge's act in denying Petitioner's motion for continuance.)

(g) Resp. Brief Page 34, where it is stated:

"The State trial court had before it the pleadings and the two depositions of the defendant at the time it ruled on the third application for continuance * * *."

(Again, a repetition of the misleading statement.)

(h) Resp. Brief Page 34, where it is stated:

"Only after the defendant's second deposition had been filed with the trial court and it became apparent that his appearance could not in any way materially effect any of the issues to be tried did the trial court overrule defendant's third application for further stay of the proceedings."

(This statement, together with the preceding statement, both found in the conclusion of Respondent's brief, demonstrates the extent to which Respondent has attempted to alter the entire atmosphere of the matter pending before this Court, by applying, with a loose brush, a pigment intended to obscure the real fact.)

Respondent's obvious emphasis on the assertion that the trial judge had actual knowledge of the contents of Petitioner's depositions only serves to demonstrate the importance Respondent places upon this pivotal point. Indeed, the question of what actual knowledge the trial judge had at the time of his ruling is one of the most critical issues here. However, Respondent is entirely in error in his assertion that the trial judge had such actual knowledge. To the extent that this issue is determinative of Petitioner's rights, it seems manifest that such issue must necessarily be decided in Petitioner's favor. Even if there were any doubt on this issue, established public policy requires that such doubt be resolved in favor of the serviceman. (See Petitioner's original brief, p. 23.)

Plaintiff Below, by Filing an Amended Complaint, Broadened the Issues Upon Which the Trial Was Had.

In our original brief, we pointed out that the plaintiff below, by filing her amended complaint (called petition), broadened the issues so that *when the trial was had, Petitioner (defendant below) could not possibly know what issues he would have to meet.*

In Respondent's brief, the wholly erroneous statement is made at pages 10 and 24:

> "* * * the issues were narrowed by the amended petition, not broadened."

This patent error is disclosed even from Respondent's brief wherein it is said at page 24:

> "The original petition set up two grounds of negligence, namely, (1) excessive speed, and (2) the driving of the car off the highway and into a tree."

Contrary to Respondent's statement, reference to the original complaint (R. 3), discloses that in paragraph 4 of the complaint (called petition), plaintiff charged that the defendant

> "carelessly and negligently entrusted the operation (of the automobile) thereof to his agent, when he knew, or by the exercise of ordinary care, should have known, that she was of immature age, was not licensed to operate a motor vehicle upon the highways of this State and that she was incompetent and incapable of properly and safely operating said automobile."

The shifting of position and theory by the plaintiff below, actually broadened the issues the petitioner was required to meet at the trial, since under the Missouri rule, in the trial of a *res ipsa loquitur* case, the plaintiff may introduce evidence of specific negligence so long as he does not

show that negligence to be the sole proximate cause of the accident. Thus, when plaintiff by her amended complaint, withdrew all allegations of specific negligence, *the door was left open for her introduction of evidence on any one of several grounds of negligence.* Since Petitioner's depositions had been taken for the purpose of meeting only the allegations in the original complaint, such depositions were therefore of no real benefit in the presentation of Petitioner's defense, and because of his military service in Korea at the time of the trial, he was at a distinct disadvantage in preparation for trial and in the actual presentation of his case. The Soldiers and Sailors Civil Relief Act was expressly designed to avoid the imposition of such hardship upon an absent serviceman.

Respondent's argument has gone far beyond the confines of the record, but if we indulge in a refutation of these many extraneous matters, we are fearful that we may obscure the single issue which merits this Honorable Court's attention.

The only issue for consideration herein is whether the trial court abused its discretion in forcing the Petitioner's case to trial during his enforced absence in Korea on military service. Despite the misleading coloration produced by Respondent's brief, *the fact remains that the trial judge, at the time he denied the continuance, did not actually know what defendant had testified to at his two earlier depositions.* The trial judge's denial of Petitioner's third application for a continuance was in every respect arbitrary, and constituted a gross abuse of discretion. This ruling effectively denied Petitioner his day in court. Manifestly, the Civil Relief Act was intended to prevent such miscarriage of justice.

Loud overtones of Respondent's brief suggest that the absent serviceman could suffer no detriment by being forced to trial merely because he might suffer no monetary damage. *It is particularly significant to note that Respondent's brief is wholly devoid of any reply to the argument and contention contained in Petitioner's first brief* (B-2, Pages 18, 49 and 50). We firmly contend that a litigant has a right to his day in court to defend his personal reputation and integrity fully aside from his monetary injury. If a defendant has been deprived of his day in court and has been branded, in absentia, as a careless and irresponsible person, no amount of monetary indemnification can erase such permanent blemish.

Petitioner most earnestly contends that a discerning appraisal of the record below, free from the coloration flowing from Respondent's brief, will demonstrate that the trial court was guilty of a gross abuse of discretion in refusing to grant Petitioner's application for continuance. Petitioner respectfully prays that this Honorable Court grant to him its writ of *certiorari,* and that upon a full hearing of this cause upon the return of said writ, the judgment of the Supreme Court of Missouri be reversed, with directions, in effect, granting Petitioner a new trial.

Respectfully submitted,

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
NORMAN A. MILLER,
FRANK C. MANN,
Counsel for Petitioner.